No. 93-7927-CFH Title: Curtis Lee Kyles, Petitioner
Status: GRANTED v.
CAPITAL CASE John P. Whitley, Warden

Docketed: Court: United States Court of Appeals for
February 10, 1994 the Fifth Circuit

Counsel for petitioner: Healy III,George W., Trenticosta,Nicholas J.

Counsel for respondent: Connick,Harry A., Ieyoub,Richard P.

Entry	Date	Note	Proceedings and Orders
1	Feb 1 1994	D	Application (A93-641) to extend the time to file a petition for a writ of certiorari from February 10, 1994 to April 11, 1994, submitted to Justice Scalia.
2	Feb 3 1994		Application (A93-641) denied by Justice Scalia.
3	Feb 10 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Mar 15 1994		Brief of respondent John P. Whitley, Warden in opposition filed.
6	Mar 24 1994		DISTRIBUTED. April 15, 1994 (Page 10)
8	Apr 18 1994		REDISTRIBUTED. April 22, 1994 (Page 15)
10	Apr 25 1994		Petition GRANTED.
			**********
16	May 13 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
11	May 17 1994	G	Motion of petitioner for appointment of counsel filed.
12	May 23 1994		DISTRIBUTED. May 27, 1994 (Page 15)
17	May 26 1994		Record filed.
		*	Original proceedings United States District Court for the Eastern District of Louisiana (3 BOXES)
13	May 31 1994		Motion for appointment of counsel GRANTED and it is ordered that George W. Healy, III, Esquire, of New Orleans, Louisiana, is appointed to serve as counsel for the petitioner in this case.
15	May 31 1994		Order extending time to file brief of petitioner on the merits until June 17, 1994.
18	Jun 10 1994		Joint appendix filed.
19	Jun 17 1994		Brief of petitioner Curtis Lee Kyles filed.
20	Jul 21 1994		Brief of respondent John P. Whitley, Warden filed.
21	Aug 9 1994		CIRCULATED.
22	Aug 17 1994		SET FOR ARGUMENT MONDAY, NOVEMBER 7, 1994. (3RD CASE).
24	Aug 22 1994	X	Reply brief of petitioner filed.
25	Oct 12 1994	G	Motion of petitioner to enlarge the record filed.
26	Oct 12 1994		LODGING by petitioner. Ten copies of petitioner's First Trial Transcript. (BOX)
27	Oct 31 1994		Motion of petitioner to enlarge the record GRANTED.
28	Nov 7 1994		ARGUED.
30	Nov 14 1994	G	Motion of petitioner for leave to file a supplemental brief after argument filed.
29	Nov 15 1994		Record filed.
		*	Original state exhibits received from the U.S. District

No. 93-7927-CFH

Entry	Date	Note	Proceedings and Orders
31	Nov 28 1994		Court for the Eastern District of Louisiana (BOX) Motion of petitioner for leave to file a supplemental brief after argument GRANTED.

93-727

ORIGINAL

NO. 93-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CURTIS LEE KYLES

Petitioner,

v.

JOHN P. WHITLEY, Warden
Louisiana State Penitentiary,
Angola, Louisiana,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 10, 1994

*COUNSEL OF RECORD

QUESTIONS PRESENTED

1. Whether production by the State of exculpatory materials, proper prosecutorial conduct, and effective performance by Petitioner's trial counsel would have resulted in acquittal or a mistrial?

2. Whether production by the State of exculpatory materials, proper prosecutorial conduct, and effective performance by Petitioner's trial counsel would have produced sufficient residual doubt in the mind of at least one juror to result in a life sentence rather than the death penalty?

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NO. 93-_____

IN THE SUPREME COURT OF THE UNITED STATES
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Curtis Lee Kyles, has been sentenced to execution by the State of Louisiana. No execution date is currently scheduled. Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Mr. Kyles seeks review of the Circuit Court's judgment dismissing his request for habeas corpus relief. Kyles v. Whitley, No. 92-3310. (5th Cir. 10/14/93) reported 5 Fed.3d 806 and attached as Appendix A. The Circuit Court affirmed the District Court's judgment dismissing the Petition for Habeas Corpus Relief, reported as Kyles v. Whitley, Appendix A to Fifth Circuit Opinion, beginning at 5 Fed.3d 844 (Ed.La. 3/24/92), C.A. No. 90-4031. The judgment of the Orleans Parish Civil District Court dated November 9, 1989 is attached as Appendix B. All of the claims ruled upon by the Court of Appeals had been exhausted in the Louisiana State Court system.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit dismissed Mr. Kyles' Petition for Habeas Corpus Relief on October 14, 1993. On November 12, 1993, his Petitions for Rehearing and Suggestion for Rehearing En Banc were denied. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254.

There is presently under consideration in the Louisiana State Court system an unexhausted claim concerning recantation by one of the alleged eyewitnesses to the murder of which Kyles was convicted. Another evidentiary hearing will be scheduled within the next few weeks, as ordered by the Supreme Court of Louisiana.

CONSTITUTIONAL PROVISIONS

This Petition involves the Sixth, Eighth and Fourteenth Amendment of the Constitution of the United States.

The Sixth Amendment provides as follows:

"AMENDMENT VI - JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS -

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Eighth Amendment provides, as follows:

"AMENDMENT VIII - EXCESSIVE BAIL, FINES, PUNISHMENTS

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in pertinent part, as follows:

"AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Prior Proceedings

Kyles was tried for murder on November 26, 1984. The jury could not agree on a verdict and a mistrial was decreed on November 27.

On December 7, 1984 Kyles was convicted of First Degree Murder under La. Rev. Stat. 14:30 and was sentenced to death. His conviction and death sentence were affirmed by the Louisiana Supreme Court in State v. Kyles, No. 86-KA-0800, 513 So.2d 265 (La. 1987) Certiorari denied, 486 U.S. 1027 (108 S.Ct. 2005, 100 L.Ed. 2d 236, rehearing denied 487 U.S. 1246 (109 S.Ct. 4,101 L.Ed. 2d 955 (1988).

On January 2, 1989, Kyles, through undersigned court appointed pro bono counsel, petitioned the Criminal District Court for the Parish of Orleans, State of Louisiana, for Stay of Execution, Post-Conviction Relief, Writ of Habeas Corpus, Evidentiary Hearing, and Motion for New Trial on the basis of newly discovered evidenced. Kyles alleged in his petition that his constitutional rights had been violated in twenty ways. The Criminal District Court denied his application on January 6, 1989. The decision was appealed to the Louisiana Supreme Court by Application for Supervisory Writ. The Supreme Court granted the Application for Supervisory Writ and ordered an Evidentiary Hearing in the Criminal District Court. After an Evidentiary Hearing which was conducted intermittently from February 20, 1989 to June 1, 1989, Judge Dennis Waldron of the Criminal District

Court denied Petitioner's motions in judgment rendered November 9, 1989.

On April 2, 1990, Petitioner filed an Amended and Supplemental Application for Supervisory Writs to review final judgment of the Criminal District Court for the Parish of Orleans. On September 14, 1990 the Louisiana Supreme Court, in a five to two opinion, denied the application without reason.

On October 2, 1990, Judge Waldron issued a Warrant of Execution ordering Kyles' execution on November 8, 1990. Kyles then petitioned the United States Supreme Court to stay the execution, which petition was denied on October 26, 1990.

Kyles then petitioned the United States District Court for the Eastern District of Louisiana, under 28 U.S.C. 2254 seeking a writ of habeas corpus.

The United States District Court, in the Opinion appended to the Opinion of the Fifth Circuit (Civil Action 90-4301), denied Kyles relief, from which denial Petitioner appealed to the Court of Appeals for the Fifth Circuit. The Court of Appeals denied relief as set forth above.

B. Facts Material to Innocence

Petitioner, Curtis Lee Kyles, was a 24 year old disabled young man who was shot eight times during the course of an armed robbery in which he was the victim in 1982.

On Thursday, September 20, 1984, Kyles took his oldest daughter and son to school. He returned home and worked on his car. Thereafter, he took it to a makeshift garage where he and

his common law brother-in-law, Johnnie Burnes, (this name sometimes appears in the record as "Burns") worked. They worked on his car until early in the afternoon when it was time for Kyles to pick up his children at school. Kyles returned home with the children at about 3:10 p.m. and remained there with them and their mother, Martina Burnes.

On the same day, at about 2:20 p.m., Mrs. Dolores Dye, a 60 year old female, was murdered in the parking lot at Schwegmann Brothers' Giant Supermarket at 5300 Old Gentilly Road, New Orleans, Louisiana. The perpetrator fired a single shot at point blank range into Mrs. Dye's left temple after a brief struggle over the keys to her car, a red Ford LTD. The murderer who drove away in the victim's car, was seen by several witnesses.

Police spoke to witnesses Isaac Smallwood, Henry Williams, and three other eyewitnesses at the scene. Later Robert Territo and Darlene Cahill called police to report witnessing the murder. The witnesses described the murderer as a young black man who wore a dark-colored shirt, blue jeans and his hair in plaits.

On Saturday night, September 22, paid informant Joseph "Beanie" Wallace, a/k/a Joseph Banks, informed officers that a man named "Curtis" had sold him a red Ford LTD. Using the address Beanie provided, police found Curtis Kyles' name and Beanie identified Kyles' photograph. Beanie stated that on Friday, he paid Kyles $400.00 for the LTD and drove it around New

Orleans. He said he later connected the car with the murder and called police. Detective John Miller testified during post-conviction proceedings that Beanie had spoken to him on previous occasions about various, unrelated shootings, although this case was the first time that Detective Miller could use Beanie's information because it was a homicide. Around midnight, Beanie led police to the car that Kyles sold him. Police soon established that the LTD in Beanie's possession belonged to the victim.

A police officer was wired to record the meeting. Beanie informed officers that Kyles lived at 2313 Desire, the apartment of Kyles' common-law wife, Martine "Pinkie" Burns. Beanie claimed that Kyles had removed Schwegmann's grocery sacks from the LTD before turning it over to Beanie. Acting on information provided by Beanie, Detectives Lambert and Saladino went to Desire Street at 1:00 a.m., Monday, September 24. They picked up five bags of garbage that had been placed outside Kyles' residence. Inside one of those garbage bags, police found the victim's purse, identification, and other personal belongings wrapped in a Schwegmann's paper grocery sack.

A search warrant for the Kyles' residence had been issued at 6:07 p.m. on September 23. At approximately 10:40 a.m. the following day officers arrested Kyles outside the residence and searched the apartment. Behind the stove, they found a .32 caliber revolver that contained five live rounds and one spent cartridge. Ballistics tests confirmed that this pistol was used

to murder Mrs. Dye. In a chifforobe in another part of the residence, officers found a homemade shoulder holster that fit the murder weapon. They also discovered two boxes of ammunition in a bedroom dresser drawer. One box contained .32 caliber rounds of the same brand as those found in the pistol.

In the kitchen, pet food was found in Schwegmann sacks located in a cabinet with pots and pans. No other human or pet food was located in that cabinet. The pet food included Nine Lives brand cat food and Kal-Kan brand dog food. No pets were observed in the household. Detective Dillman testified that police found no cat litter nor a litter box, although a photograph of the chifforobe shows a bottle labelled "Hart Flea." The victim's husband, Mr. Robert Dye, testified at trial that his wife usually purchased several brands for their cats and dogs, including Nine Lives and Kal-Kan.

Partial fingerprints were found on the victim's effects, but none was sufficient for an identification. No fingerprints were found on the murder weapon or in the LTD, but Kyles' prints were recovered from a Schwegmann's cash register receipt bound on the floor of the LTD. The receipt's contents had been rendered illegible by the chemical process used to raise the fingerprints.

After Kyles became a suspect, Detective John Dillman prepared a photographic line up. On Monday, September 24, Dillman showed the lineup to five eyewitnesses to the murder. Three of them picked Kyles out from the array of photographs of

young black men. These three witnesses, as well as a fourth eyewitness who was not asked to view the photographic line up, also identified Kyles at trial as the gunman.

The defense contended at trial that the initial informant, Beanie, framed Kyles. Kyles denied any involvement in the murder, his defense implied that Beanie was the murderer. Beanie possessed the LTD when he spoke to police, and the defense theory accused Beanie of planting the victim's possessions and the murder weapon at Kyles' residence. Beanie did not testify at the trial for either the prosecution or the defense. Four defense witnesses Kevin Black, Ronald Gorman, Johnny Burns, and Kyles himself, testified that they saw Beanie in a red car similar to the victim's after the killing on Thursday, September 20. Defense witness Donald Powell stated that Beanie tried to sell him the LTD on Friday for $300. Johnny Burns testified that he saw Beanie change the license plates on the LTD Friday night, demonstrating that Beanie knew the car was stolen.

Central to the defense was the theory that Beanie had planted the most incriminating evidence in Kyles' apartment and garbage. Defense witnesses testified that Beanie attended a gathering at Kyles' residence on Sunday night, September 23. The testimony of Kyles' friends and relatives conflicted as to the number of persons present and what dinner was served. Johnny Burns, Pinkie's brother and so Kyles' brother-in-law, testified that during this evening he saw Beanie stooping near the stove, where the murder weapon was later found. Kyles testified in his

own defense. He denied owning the revolver and holster and stated that they must have been planted in the apartment. Kyles stated that the .32 caliber shells were among ammunition he received when Beanie gave him a .22 caliber rifle as security for a loan. The defense contended that Beanie was romantically interested in Pinkie Burns, Kyles' common-law wife. Defense eyewitnesses Cathy Brown and Carolyn Campbell said that they had witnessed Beanie make sexual advances to Pinkie.

Kyles denied any involvement in the shooting of Mrs. Dye. To explain the Schwegmann's receipt bearing his fingerprints found in the LTD, Kyles stated that Beanie had picked him up in a red car on Friday and taken him to Schwegmann's, where Kyles purchased transmission fluid and a pack of cigarettes. He suggested that the receipt might have fallen from the bag when he removed the cigarettes. Kyles also testified that he had purchased the pet food found in his apartment at Schwegmann's on another occasion. Kyles claimed that he owned a dog, which was sometimes kept in Mississippi at his mother-in-law's home. He did not know where it was at the time of trial. He also stated that his son kept a cat and that they fed stray cats. Other defense witnesses gave varying testimony as to whether or not Kyles or his children had a dog or cat.

REASONS FOR GRANTING THE WRIT

The reasoning of the majority opinion of the Court of Appeals conflicts with applicable decisions of this Court.

> "For the first time in my fourteen years on this court - during which I have participated in the decision of literally dozens of capital habeas cases - I have serious reservations about whether the State has sentenced to death the right man. My reservations are directly relevant to the two main constitutional claims that Kyles has raised - an ineffective-assistance-of-counsel claim and a Brady claim. Both claims are governed by a standard that asks whether there is a 'reasonable probability' that, but for the constitutional infirmities at trial, 'the result of the proceeding would have been different.' United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (citing Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068). A 'reasonable probability' is one that is 'sufficient to undermine confidence in the outcome.'" Dissent § 820.

Mr. Kyles' conviction and sentence of death resulted from the failure of the State to provide to his trial counsel, upon request, and upon becoming aware of false testimony, significant, material, exculpatory evidence, and because his trial counsel failed to call as a witness Joseph Wallace, a/k/a Beanie, the informant who led police to suspect Kyles, notwithstanding that he earnestly wanted to call Beanie as a witness. Because of a misunderstanding of fundamental Louisiana Evidence law, he decided against calling Beanie as a witness.

ARGUMENT

Kyles was convicted on the basis of the testimony of four eyewitnesses who testified that they identified Kyles as the murderer, the victim's purse being found in his garbage, the murder weapon being discovered beneath the stove of Kyles' usual residence, and ammunition, a holster and pet food of the variety frequently bought by the victim being found in his residence.

It was the theory of the defense that Beanie had framed Kyles, had planted certain of the evidence, and had changed the license plates on the victim's automobile which he claims to have purchased from Kyles.

The State failed to disclose material which had been requested by defense counsel, and which would have confirmed the Petitioner's theory that he had been framed, contrary to Brady v. Maryland, 373 U.S. 83, 83 S.C. 1194, 10 L.Ed.2d 215 (1963). The exculpatory material included the surreptitiously obtained tape recording, a typed statement of informant Beanie, a handwritten memorandum of Assistant District Attorney Cliff Strider concerning his interrogation of Beanie before the second trial, a list of license plates on "all" automobiles parked in the parking lots around Schwegmanns Brothers Super Market on the evening following the murder, and the statements taken from eyewitnesses a few days following the murder, some of which were significantly inconsistent with the trial testimony of the same witnesses.

The State of Louisiana also failed to disclose New Orleans Police Department memoranda concerning instructions given to patrolmen to seize the garbage in front of Kyles' part time residence in the early morning hours on Monday, September 24, 1984.

Petitioner also sought habeas corpus relief on the grounds of prosecutorial misconduct because the district attorneys knowingly permitted, if not encouraged, eyewitness Smallwood to testify that he actually saw the murderer draw a

revolver and shoot the victim. His statement taken four days after the murder indicated that he did not become aware of the struggle between the victim and the murderer until after he heard a shot and he did not see the murderer until he was driving away in the victim's automobile. Petitioner also complained of prosecutorial misconduct because the assistant district attorneys persuaded the trial judge to give chilling, Miranda type warnings to two of the defense's key witnesses just before they testified, notwithstanding that they had no reason to believe that the two witnesses were in any way involved in the murder.

The majority opinion indicated that the judges were "not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense...". The majority erroneously characterized the withheld evidence as "... cumulative and generally inconclusive...".

A. Brady Violations

While satisfied that trial counsel was able to present his theory to the jury (5 Fed.3d 817) and relying upon the statement made by the trial court during the post-conviction hearing that "...Johnnie Burnes' testimony was not credible...", the majority opinion obviously ignored the reality that the undisclosed evidence would have confirmed the theory propounded by the attorney representing Kyles and would have bolstered the credibility of the testimony of Johnnie Burnes, which the Fifth Circuit said it "lacked" (p. 816). The undisclosed evidence would have revealed that Johnnie Burnes was telling the truth

when he testified that he saw Beanie, his "partner", change the license plate because Kyles impliedly admitted this to the police during the surreptitious recording and told Assistant District Attorney Strider that he had changed the license plate. The Strider memorandum would also have confirmed the testimony of Johnnie Burnes and the others who testified that there was indeed a gathering at the home of Kyles' girlfriend on the evening before the garbage was commandeered and that Beanie was present and in a position to plant the evidence and to insert the victim's possessions into the garbage later found in front of Kyles' residence. The theretofore unrelinquished evidence would also have confirmed the theory, which had theretofore not been supported by any evidence, that Beanie put the victim's possessions in Kyles' garbage. The tape revealed that Beanie suggested that the police, for the first time in anyone's memory, sequester a suspect's garbage. The Strider memo indicated that Beanie and a member of the New Orleans Police Department rode around Sunday night or early Monday morning waiting for Kyles' garbage to "go out." There was nothing "cumulative" about the evidence which was withheld; the evidence would have confirmed the defense theory and enhanced the credibility of defense counsel and the key defense witnesses.

The majority opinion chose to attach little or no significance to the list of license plates made by one of the investigating officers at 9:15 on the night of the murder, apparently based upon the testimony of Detective John Miller who

said that the officer who recorded the license plates did not record "all", Detective Miller testified, under cross-examination by court appointed counsel, that he did not know whether all or less than all had been listed. As Judge King points out, the memorandum purports to indicate that all license plates were recorded. The list of license plates is crucially significant because of the attempt by the prosecution to have the jury believe that Beanie, Kyles, Burnes and one or two other people went to Schwegmann Brothers the night after the murder to retrieve Kyles' automobile.

The Court of Appeals for the Fifth Circuit erroneously interpreted this Court's decision in Brecht v. Abrahamson, 507 U.S. __, 123 L.Ed.2d 353, 113 S.Ct. 1710 as establishing a standard for all habeas cases. The five to four decision cannot possibly stand for the proposition that a person convicted of a capital crime as a result of false testimony, allowed knowingly by the prosecution, must prove that the egregious conduct of the State had a substantial and injurious effect or influence in determining a jury's verdict. While such a test may now be applicable to Doyle errors, such a test has no place under the circumstances of this case. Had the Court wished to overrule Chapman v. California, 366 U.S. 18, 17 L.Ed. 705, 87 S.C. 824 (1967) and the other cases establishing different standards for different circumstances the Court could have done so specifically. To apply to this case a rule not applicable to the rule applied on direct review would be an endorsement of the

State's behavior at the Kyles' trial. Unlike the Brecht impropriety, which was obvious when it occurred, Kyles could not have been aware of the violations of his constitutional rights until following the direct appeal process. Indeed, they did not come to light until after the direct appeal procedure was terminated. See Dissent 840 n. 60, and 831, n. 41.

Contrary to the majority's holding, at P. 629, the defense had no legal burden to establish that all four eyewitnesses were mistaken in order to demonstrate that undisclosed Brady material would have provided trial counsel with cross-examination material sufficient to undermine the confidence in the outcome of the trial.

It is Petitioner's position that the jury's confidence in the eyewitness identifications generally would have been undermined if the defense could have impeached one or more with inconsistent statements as to what they saw or as to the descriptions they gave to police.

Concerning the majority assertion that no suggestions were made during the identification process, only Detective John Dillman testified at trial about the photographic lineup, and his credibility is in serious question. Dissent at 837, p. 55. Furthermore, the credibility of the two eyewitnesses could have been effectively challenged by Kyles had the valuable evidence been disclosed.

> A reasonable juror could not have reached any other conclusion except that Smallwood dramatically changed his story by the time of the trial, thereby undermining the credibility of his identification.... The majority

here ignores the important fact that a jury would probably have disbelieved anything that Smallwood said after it was revealed that he had fundamentally changed his account of the murder by the time of trial.... Williams, too, would have had a difficult time explaining how he could have described a 6' skinny man as 5'4" or 5'5" and possessing a "medium" build. Dissent at 839 n. 58.

As to the majority's requirement that Kyles must establish that "all four [eyewitnesses] were mistaken," p. 813, in order to substantiate his claim that undisclosed documents "impeded his challenge to the eyewitness identifications." Id. at p. 12, the basis for this burden of proof is a mystery. The Court does not cite any authority for this proposition, and counsel has been able to find none. As was noted by Judge King,

> ..,effective impeachment of one eyewitness may have consequences that extend to another, unshaken eyewitness. See United States v. Agurs, 427 U.S. 97, 112-13 n. 21 (1976) (citing Comment, Brady v. Maryland and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 135 (1972). In Kyles' case, the remaining unimpeached eyewitness testimony would thus have been considerably less forceful and the two witness statements been disclosed." Dissent at 839 (emphasis added).

The majority has adopted a burden of proof regarding challenged eyewitness testimony which is not only unprecedented but unwarranted. Thus, the majority's so-called "weighty evidence of guilt" which it bore in mind while assessing the probable effect of other undisclosed information on the jury's verdict was in fact illusory.

B. Ineffective Counsel

As to performance of trial counsel, considered independently of his being incapacitated by the withholding of crucial evidence, the majority opinion concedes that trial counsel was ignorant of the appropriate Louisiana law of evidence which would have permitted him to cross-examine Beanie if he showed hostility or was surprised by the testimony of Beanie. Nevertheless, the majority concluded that the decision not to call Beanie was a proper one, even if made for the wrong reason. The majority opinion disregards the testimony of trial counsel Martin Regan who testified that it would have been a different trial had he called Beanie and that he would have called Beanie had he been cognizant of the law. The majority opinion ignores, indeed it makes no mention, of the testimony of the only expert on criminal law who testified at the evidentiary hearing, Mr. Sam Dalton. Dalton testified unequivocally that an entirely different scenario would have existed but for the improvident decision by Regan. Likewise, the majority opinion ignored Dalton's testimony as to the significantly beneficial effect the secreted evidence would have had on the outcome of the trial.

The defense theory of the case was that Beanie had committed the murder and then tried to frame Kyles. Beanie was not called to the stand by either the State or Kyles. Kyles did not call him to the stand because defense counsel Martin Regan made an error when he interpreted Louisiana evidence law.

> During post-conviction hearings, Regan stated that the reason he did not call Beanie to testify was his

misunderstanding of Louisiana evidence law. He believed that if the defense called Beanie, he would not be able to ask leading questions unless he demonstrated both surprise and hostility. That belief was erroneous. Id. at 819.

At the time of trial, the plain language of the applicable state evidence rule was as follows: "No one can impeach his own witness, unless he has been taken by surprise by the testimony of such witness or unless the witness shows hostility toward him, and even then, the impeachment must be limited to evidence of prior contradictory statements." Thus, as a matter of state law, the state trial court was mistaken. With respect to the federal district court's additional conclusion that Regan made a "strategic" choice not to put Beanie Wallace on the stand on the ground that he likely would not prove to be "hostile," I would reject this finding as clearly erroneous.... In reliance on the opinion of the highest expositor of state law in Louisiana, I believe that Regan was deficient in failing to call Wallace to the stand because of a "clear" misunderstanding of a single, basic rule of evidence. Dissent at 828.

The standard to evaluate whether counsel is ineffective is articulated in Strickland v. Washington, 466 U.S. 668 (1984). There are two prongs to the Strickland test. Kyles must show (1) that counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment, and (2) counsel's errors prejudiced the defense depriving the defendant of a fair trial whose result is reliable. The majority looked only at the first prong and concluded that it could conceive of an attorney who could have been a strategic decision not to call Beanie as a witness.

> As a matter of trial strategy, the choice of witnesses enjoys a presumption of reasonableness. We are not persuaded that the decision not to call Beanie was an unreasonable one outside the bounds of professional judgment. To the contrary, the dangers of calling Beanie as a defense witness are very evident. As the district court put it, any reasonable attorney would

> perceive Beanie as a "loose cannon."... [C]ompetent counsel would realize the risk that if Beanie's credibility were not completely destroyed by his demeanor and prior statements, then his incrimination testimony would have strengthened the prosecution's case.... Only hindsight allows one to say that Kyles had nothing to lose and that counsel should have taken that risk. Beanie was a two-edged sword, and we conclude that Regan did not act unprofessionally in choosing not to draw that weapon at trial. Id. at 818 (internal citations omitted) (emphasis added).

Strategy is defined as "a careful plan or method; the art of devising or employing plans or stratagems toward a goal." Webster's New Collegiate Dictionary, (1981) p. 1141. An error on the other hand, is defined as "an act or condition of ignorant or imprudent deviation from a code of behavior, an act involving an unintentional deviation from truth or accuracy." Id. at 385.

Although judicial scrutiny of counsel's performance must be highly deferential, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Knighton v. Maggio, 740 F.2d 134, 1349 (5th Cir.) cert. denied, 469 U.S. 924 (1984), citing Strickland, 104 S.Ct. at 2065-66. Strickland also instructs that a petitioner has rebutted the presumption that under the circumstances the challenged action might be considered sound trial strategy when he shows that the action was the result of error and not the result of trial counsel's strategic choice made on a reasoned basis after adequate investigation. 104 S.Ct. at 2065; Matteson v. King, 751 F.2d 1432, 1437 (5th Cir.) cert.

denied, 475 U.S. 1138 (1986). The majority found that Regan's failure to call Beanie was the result of error; hence, Regan's failure to call Beanie as a witness "was anything but strategic." Dissent at 828. However, the majority concluded

> ...that a reasonable, competent attorney would not have erred in failing to call Beanie to testify and therefore the actual cause of trial counsel's failure to do so is not controlling. Id. at 819.

In other words, the majority can conjure a chimerical attorney who could have chosen not to call Beanie as a witness and that would not have been an error. Yet, that is not the test under Strickland. The actual attorney and his actual strategic acts must be evaluated.

Regan testified unequivocally that his one and only theory of the case was that "Beanie had committed the murder." [Evidentiary Hearing, Feb. 20, 1989, p. 25]. Had he understood the law, he would have cross-examined Beanie at length. [Evidentiary Hearing, Feb. 20, 1989, pp. 23-29]. Cross-examination that helps the theory of the case is good cross-examination. McElhaney's Trial Notebook (2d ed.) p. 265. Cross-examination's primary purpose is to secure admissions of fact that tend to prove one's case. E. Imwinkelried, Exculpatory Evidence, 803-805 (1990).

> The entire purpose of calling [Beanie] would have been to expose his leading role in the development of the prosecution's case, to impeach him and in the process, to accuse him of framing Kyles and suggesting that [Beanie] had some role in the murder. Dissent at 828.

Consequently, Regan's undisputed error, his blunder, should not have been given any deference whatsoever by the court. Thus, its conclusion that "the failure to possess impeachment evidence material could not, in reasonable probability, have affected the outcome of the trial" is plainly wrong. Reasonable people could and in fact do disagree about the impeachment evidence. Two of the seven Louisiana Supreme Court Justices and one federal appellate Judge who have reviewed the record would have granted the writ.

C. Prosecutorial Misconduct

The Fifth Circuit, probably because the majority believed that Brecht provided insulation from all constitutional deprivations during trial, and the minority because it believed, correctly, that the Brady and Strickland violations, alone, prejudiced Petitioner, did not address the effect of the prosecutorial misconduct. The majority cursorily dismissed the significance by stating at p. 820, "we are not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense." The failure of the prosecutors to advise the Court that witness Smallwood's fabrication (euphemistically referred to by the United States District Court as embellishment) was prejudicial, unethical and unconscionable. Confronted with the blatant lie of Smallwood on the witness stand and the fact that he was able to identify the automobile make correctly, LTD; he recalled a Thunderbird four days after the killing and accurately "remembered" an LTD more than three months later. Had

the earlier statement been called to the attention of the Court, such may have precipitated a truthful answer as to how the witness acquired the "embellished" information. By failing to call the Court's attention to the dramatically inconsistent earlier statement, the State countenanced false testimony, which in this case may have been pernicious.

Considering the devastating testimony Smallwood gave the jury, his exculpatory statement discovered in the initial Police Report is the type of evidence to which the Agurs Court refers.

Please see the Fifth Circuit's ruling in Lindsey v. King, 769 F.2d 1934 (1985) concerning the reasonable probability, had Smallwood's trial testimony been challenged and his credibility destroyed (which is a virtual certainty), a pattern of discredibility would have tainted the other alleged eyewitnesses:

> "...our experience at the bar has been that positive identification by two unshaken witnesses possess many times the power of such an identification by only one and that the destruction by cross-examination of the credibility of one of two crucial witnesses--even if the other remains untouched--may have consequences for the case extending far beyond the discrediting of his own testimony." Id. at 1042.

The prosecution failed to disclose to the defense exculpatory evidence that would have altogether destroyed the credibility of the State's eyewitness and created a lingering effect of discredibility onto the other State's witnesses. The District Attorney blocked petitioner's avenue of due process,

leaving petitioner's trial attorney no room for impeachment questions for Smallwood.

It is constitutionally established that a denial of due process "rises above" when a representative of the State permits false testimony, or withholds exculpatory evidence from a defendant to obtain a conviction. Mooney v. Holohan, 55 S.Ct. 340; Pyle v. Kansas, 63 S.Ct. 177; Alcota v. Texas, 78 S.Ct. 103; Naupe v. Illinois, 79 S.Ct. 1173. And where defendant is consequently convicted and sentenced to die, this denial of due process is at its peak.

There is no room for doubt that the representatives for the State knew about Smallwood's initial statement made four days after the murder, refused to disclose this exculpatory evidence to the defense via a Motion for Discovery, and allowed Smallwood to provide the jury with a very different and damaging eyewitness account as to what he allegedly observed.

The test to be applied under the circumstances surrounding the Smallwood testimony was set forth by the Fifth Circuit in the case of Kirkpatrick v. Whitely, 992 Fed.2d 491 (5th Cir. 1993).

> "We observe that different standards of materiality apply to Brady claims and claims that the prosecution has knowingly used perjured testimony or false evidence. The materiality standard for Brady claims, regardless of whether the defense made a specific or general request (or no request at all) for the withheld evidence prior to trial, is as follows: 'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.' Conversely, if

> the prosecutor has knowingly used perjured testimony or false evidence, the standard is considerably less onerous: the conviction 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict....'"

The Court relied on this Court's opinion in the United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985), and cited the case of United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976).

As early as 1935 this Honorable Court, in Mooney v. Holohan, supra, recognized that the defendant's constitutional rights are violated by the prosecutor's failure to call attention to perjured testimony.

The Court of Appeals for the Eighth Circuit, in the case of United States v. Peltier, 731 Fed.2d 550 (1984), in discussing the Brady material, stated:

> Whether the government's nondisclosure of Brady exculpatory material requires reversal depends on the nature of the material and the specificity of defense requests for disclosure: (1) if the undisclosed evidence demonstrates that the prosecution introduced testimony it had reason to know was perjured, the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," United States v. Agurs, 427 U.S. 97, 102\3, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (footnote omitted); (2) if a specific request for evidence was made by the defense, but such exculpatory evidence was not given, then the conviction or sentence must be overturned if the evidence "might have affected the outcome of the trial," Id. at 104, 96 S.Ct. at 2398; and (3) if only a general request or no request for exculpatory evidence was made, then the prosecution's nondisclosure of such evidence will constitute constitutional error only if "the omitted evidence creates a reasonable doubt that did not otherwise exist," Id. at 112, 96 S.Ct. at 2402 (at 552).

D. Prejudice in the Sentencing Phase

Although the law does not require that a trial judge give a jury charge on the question of residual doubt, the law does recognize the value afforded defense counsel in arguing residual doubt in the sentencing phase. If the undisclosed evidence had not carried the day during the guilt phase, it certainly would had enhanced Petitioner's chances of being given a life sentence rather than sentenced to execution.

Under Louisiana law, both a capital conviction and a death sentence require unanimity among the jurors. One juror having reasonable doubt would have been sufficient to prevent a conviction (La. Constitution Art. 1 Sect. 17) and sentence to execution. See State v. Lloyd, 459 So.2d 498, 503 (La. 1984).

This Court has repeatedly and consistently insisted that the highest standards of reliability and fairness be observed when a person's life hangs in the balance. As Chief Justice Burger emphasized, "'the penalty of death is qualitatively different from any other sentence...We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (quoting Woodson v. North Carolina, 428 U.S. at 305); see also Johnson v. Mississippi, 486 U.S., 578, 584 (1988) (the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case).

In emphasizing this greater need for reliability in capital sentencing determinations, the Court has required that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for accuracy in factfinding." Strickland v. Washington, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part). The Court has also determined that the Eighth Amendment requires the sentencers to have complete discretion in deliberating the sentence by striking down mandatory death penalty statutes. See, Woodson, supra; Sumner v. Schuman, 483 U.S. 66 (1987).

Because of the vigilance required in assuring the Eighth Amendment's heightened level of reliability in the sentencing decision, a determination of whether the withholding of crucial items of exculpatory evidence requires reversal of the death sentence must reflect the greater need for reliability. "Because of this heightened concern for reliability, time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." Satterwhite v. Texas, 486 U.S. 249, 262 (1988) (Marshall, J., concurring in part and concurring in judgment) (citations omitted.)

The Bagley "reasonable probability" test is a test to determine if the Due Process Clause of the Fourteenth Amendment is violated in determining the question of guilt. Thus, this test is inapplicable to errors occurring at the sentencing phase of the trial. In a capital sentencing

context, the Eighth Amendment's enhanced level of reliability must be met since the capital sentencing process is unlike the guilt phase of any criminal trial. During the guilt phase, the jury must decide whether the State's evidence shows beyond a reasonable doubt that the defendant committed each element of the crime charged. Deciding whether a defendant lives or dies involves a significantly different process.

Substantial discretion is granted to the sentencers because, unlike the guilt determination where the jury measures the State's evidence upon a scale calibrated with reasonable doubt, the sentencing determination allows the jury to consider any and all compelling and insignificant factors relating to the defendant and/or the crime in order to render a reasonable moral response. For this reason, the Court has concluded "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record," Caldwell v. Mississippi, 472 U.S. 320, 330 (1985), and that "the evaluation of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given the sentencer." Satterwhite, supra.

The rationale of Caldwell and Satterwhite makes clear that the "reasonable probability" test of Bagley is inappropriate for determining reliably whether the State's withholding of exculpatory evidence influenced the capital

sentencer. Because the evaluation is at best difficult, the "no effect" standard adopted in Caldwell, or the "harmless beyond a reasonable doubt" standard approved in Satterwhite are more appropriate.

When, as here, the State has unilaterally withheld exculpatory evidence that would have influenced the sentencer to reject a death sentence, the burden should fall upon it to show the evidence would not have so affected the sentencer. This burden is fully consistent with the State's responsibility to assure a fair trial.

In Brown v. Chaney, 469 U.S. 1090 (1984), Chief Justice Burger, joined by Justices Rehnquist and White, dissented from the denial of certiorari. The Court of Appeals had held that the State's suppression of evidence which tended to show that Chaney may not have personally killed did not warrant a new trial as to guilt but warranted issuance of the writ as to sentence because the evidence "'might have affected' the jury's determination on the death penalty." Chaney v. Brown, 730 F.2d 1334, 1351 (10th Cir. 1984). Chief Justice Burger, noting "[t]he question of what constitutes 'material' information in the context of the sentencing decision merits our attention", Brown v. Chaney, 469 U.S. at 1096, explained why this issue warranted plenary review:

> To decide whether the withheld information was material to the sentencing decision raises a host of questions that have never been considered by this Court. Brady and Agurs [and Bagley] in terms

> do not deal with evidence on mitigating circumstances. Do the standards for reversible error that apply in the guilt phase apply unchanged in the sentencing phase, or must new standards be crafted? Should the court look to the sentence imposed in light of all the evidence, or should it look only to sentences imposed in light of all the evidence, or should it look only to whether a violation occurred? Do they apply only to sentences imposed by juries, or also to sentences imposed by judges? Do Brady and Agurs [and Bagley] apply only to capital sentencing decisions, or to all sentencing decisions? Id. at 1096.

The cumulative impact upon the jury of the withheld evidence would have precluded a death sentence.

Courts have recognized that a lack of confidence in the strength of the State's case can have such an effect. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984) ("[i]n this case, use of Wesley and Patricia Johnson's prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty"); Smith v. Balkcon, 660 F.2d 573, 581 (5th Cir. Unit B 1981), modified, 677 F.2d 20, cert. denied, 459 U.S. 882 (1982) ("the jury entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremediable penalty of death").

The Eighth Amendment requires greater scrutiny and in this case necessitates a conclusion that the withheld evidence would certainly have had an adverse Eighth Amendment impact.

REQUEST FOR A DEFERMENT OF ACTION

We respectfully request, in view of the unexhausted claim being adjudicated in the State Court system, that your Honors defer a decision as to Petitioner's request for a Writ of Certiorari pending either Petitioner being granted appropriate relief in the State Court system or, if unsuccessful in the State Court, his submitting the previously unexhausted claim to habeas review in the Federal system.

CONCLUSION

WHEREFORE, for the reasons set forth above and in the dissent beginning at page 820, Petitioner Curtis Lee Kyles prays that this Court grant a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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STATE OF LOUISIANA

VS.

CURTIS KYLES

CASE NO. 303-970, SECTION "F"

Consolidated with

CURTIS LEE KYLES

VS.

ROBERT HILTON BUTLER, Warden,
Louisiana State Penitentiary,
Angola, Louisiana

LOUISIANA SUPREME COURT CASE NO. 86-KA-0880

JUDGMENT

The Court denies both the defendant's Motion for New Trial and the relief sought in defendant's Writ of Habeas Corpus. In rejecting the defendant's claims in both of these proceedings, the Court makes the following observations and draws the following conclusions:

I.

Defense Counsel, Martin Regan, was not ineffective within the meaning of Strickland versus Washington, 104 S.Ct. 2052 (1984), in representing the defendant at trial. The Court finds that Mr. Regan provided the defendant with a vigorous, dedicated and more than adequate defense. As he always has been, in the many cases he has tried before this Court, Mr. Regan was a tenacious advocate on behalf of his client. His reputation as an attorney who is always prepared for, familiar with his case, and professional in his presentation remains intact despite the outcome of this particular case.

This Court appreciates Mr. Regan's self-deprecating testimony at the Motion for New Trial hearing; wherein he offered

Appendix B

the opinion that he was ineffective in his representation in this case. Despite this most humble act on the part of counsel, the Court begs to differ with him.

Much has been made of Mr. Regan's opinion that he failed miserably in his defense of Mr. Kyles when he chose not to call Joseph Wallace as a witness. Mr. Regan indicated that he incorrectly viewed the law as saying that if he called Joseph Wallace as a witness that he would have to vouch for his credibility unless he could have shown both hostility and surprise on the part of Mr. Wallace at the time Mr. Wallace testified.

This was the law of Louisiana at the time of both of Mr. Kyles' trials. At that time, the rule regarding such situations was found in La. R. S. 15:487, which provided:

> "No one can impeach his own witness, unless he have been taken by surprise by the testimony of such witness, or unless the witness show hostility toward him, and, even then, the impeachment must be limited to evidence of prior contradictory statements."

The law of Louisiana has subsequently been amended in this regard by virtue of the adoption of Article 607 of the Louisiana Code of Evidence. But at the time of Mr. Kyles' trial, under then existing law, Defense counsel certainly made an intelligent and strategically correct decision in not placing Mr. Wallace on the stand as a defense witness.

The Court further finds that the fact that Mr. Regan never made use of an investigator in connection with this case and never consulted with a possible expert on the identification issue involved in this case is not evidence of ineffectiveness on his part. As is further noted elsewhere in this judgment, the evidence on the issue of identification was overwhelming in this case. The Court fails to see how an investigator and/or an expert could have in any way changed the outcome of the ultimate trial of this matter.

II.

The Court finds no merit to any of the Defense allegations regarding prosecutorial misconduct and alleged violation of Brady versus Maryland, 83 S.Ct. 1194 (1963).

Assuming, arguendo, that certain background information concerning and statements of Joseph Wallace were withheld by the State; the Court finds that this is not ultimately prejudicial to the Defense. The Court concludes that none of this evidence would have ultimately assisted the Defense to any significant degree in this case.

It is important to note that Joseph Wallace was never called as a witness by the State. As such, there never could be an attempt by the Defense to attack the character and credibility of Mr. Wallace.

Hence, the State never sought to vouch for the credibility of Mr. Wallace. As such, there would be no basis for the attempted impeachment of Mr. Wallace by the Defense.

It should be further noted that the Defense was given ample opportunity, and successfully placed before the jury through credible evidence, the basic premise of the Defense's case, that Joseph Wallace was in fact the killer of Mrs. Dye and that Joseph Wallace "framed" the defendant for this killing. The Defense even went so far as to present evidence as to a possible bias and motive; i.e. Wallace's desire to gain the affection of Curtis Kyles' female acquaintance--by having Kyles convicted of this crime and thereafter incarcerated.

The jury was more than adequately exposed to the possibility that Joseph Wallace was in fact the killer. They were aware that he was in fact in possession of the victim's car shortly after her murder.

The jury was likewise given the opportunity to see

Mr. Wallace in person as he was brought into open court at the behest of the State. He was made to literally stand before the jury. At the same time, the jury was afforded the opportunity to compare his height, his size, his physical characteristics to those of the defendant.

Of course, the jury ultimately rejected the defense in this case and concluded that Mr. Wallace was not in fact the killer; but that Mr. Kyles was.

III.

It should be further noted that there was testimony taken at the Post Conviction Motion hearing that involved Johnny Burnes. This Court, having had the opportunity to view Mr. Burnes on the witness stand and to hear his testimony, has chosen to totally disregard everything that he has said. Purely by coincidence, this Court has presided over the trial of Mr. Burnes, wherein he was convicted of the killing of Joseph Wallace.

IV.

In conclusion, this Court finds that the evidence against the defendant in this case is overwhelming. The following facts, proven beyond a reasonable doubt to the jury that heard this case, cannot be overlooked:

1. A series of unrelated, totally disinterested, unbiased witnesses, from every walk of life identified, without hesitation or reluctance, at two separate trials Curtis Kyles as the killer of Mrs. Dye.

2. The weapon used to kill Mrs. Dye was found behind the stove in the kitchen of the defendant's home on the weekend following the murder, within some 72 hours of the homicide.

3. Also found in the home was a collection of various pet foods. These pet foods were identified at trial as being the same brands that Mrs. Dye purchased weekly for a group of cats and dogs that she fed on a daily basis. This link between the brands of pet food and Mrs. Dye was established by the uncontradicted testimony of her husband. The defendant took the witness stand and in the opinion of this Court perjured himself when he testified that he purchased these pet foods at Schwegmann Supermarket because they happened to be on sale. This testimony was completely contradicted by the State's rebuttal witness, the employee of Schwegmann's Supermarket; who testified that absolutely none of these items were on sale during the week of Mrs. Dye's death. Additionally, it should be noted that there was no real evidence that the defendant, at the time of his arrest, owned any cats or dogs. The police testified that they saw no evidence of any pets at the defendant's home when he was arrested. It should be noted that one bottle of pet shampoo was located during a search of the home. This, however, appeared to be of some age, and the container was at least half empty. The Court is of the opinion that this obvious lie on the part of the defendant may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire defense in this case and led to the verdict rendered.

4. As noted earlier, the jury saw Joseph Wallace in court. They were given every opportunity to observe how he clearly and distinctly did not resemble the defendant in this case.

5. More importantly, each of the witnesses was likewise afforded the opportunity in open court to observe Joseph Wallace. Each of them categorically stated that Joseph Wallace was not the killer. At the same time, each again reaffirmed their opinion that the defendant, and the defendant alone, was responsible for the death of Mrs. Dye.

6. The victim's purse and personal belongings were found in a garbage can that had been placed for collection on the curb outside of the defendant's home.

Was Joseph Wallace a killer? The Defense has portrayed him as the killer of a seaman and an elderly lady in Lakeview. This portrayal may or may not be accurate. However, this Court is convinced, as was the jury, that Joseph Wallace was not the

killer of Mrs. Dye; but that Curtis Kyles was the person responsible for the death of Mrs. Dye. The Court finds that the new evidence allegedly available, even if presented to another jury, would not in any way lead to a different outcome of this case.

New Orleans, Louisiana, this 9th day of November, 1989.

DENNIS J. VALDRON
Judge, Section "F"

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U. S. COURT OF APPEALS
FILED
NOV 12 1993
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3310

CURTIS LEE KYLES,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary
and RICHARD P. IEYOUB, Attorney
General, State of Louisiana,

Respondent-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/14/93, 5 Cir., _____, _____ F.2d _____)

(November 12, 1993)

Before KING, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
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ENTERED FOR THE COURT:

Patrick E. Higginbotham
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-8

11/12/93

Curtis Lee KYLES, Petitioner-Appellant,

v.

John P. WHITLEY, Warden, Louisiana State Penitentiary, etc., et al., Respondents-Appellees.

No. 92-3310.

United States Court of Appeals, Fifth Circuit.

Oct. 14, 1993.

Petitioner whose capital murder conviction and death sentence were affirmed on direct appeal, 513 So.2d 265, filed petition for habeas corpus. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., denied petition, and petitioner appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) failure to disclose information relating to informant did not amount to *Brady* violation despite defendant's claim that informant framed him, and (2) trial counsel's failure to interview informant or to call informant as witness did not amount to ineffective assistance.

Affirmed.

King, Circuit Judge, filed dissenting opinion.

1. Habeas Corpus ⇐442

Standard that controls whether to grant habeas relief for trial error, as distinguished from structural error, is whether error had substantial and injurious effect or influence in determining jury's verdict. 28 U.S.C.A. § 2254.

2. Criminal Law ⇐700(2.1)

Prosecution is obliged under *Brady* to disclose not only favorable evidence material to guilt or punishment, but also evidence useful to defense or impeachment. U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐700(2.1)

Successful *Brady* claimant must show prosecution's suppression of evidence, favorableness of that evidence, and materiality of that evidence. U.S.C.A. Const.Amend. 14.

4. Criminal Law ⇐700(2.1), 1213.8(8)

Eighth Amendment did not foreclose using in capital murder prosecution, as standard of materiality under *Brady*, whether nondisclosure of evidence undermines confidence in outcome of trial, where only effect alleged *Brady* materials could have had during sentencing phase would be through residual doubt. U.S.C.A. Const.Amends. 8, 14.

5. Criminal Law ⇐700(3)

In capital murder prosecution, prosecution's failure to produce transcript of recording of informant's first conversation with police officers, written statement signed by informant after police interviews, notes taken by prosecutor during interview with informant, police memorandum directing officers to pick up garbage in front of accused's residence, and list of license plate numbers from cars parked in lot where murder occurred was not withholding of material information amounting to *Brady* violation, despite accused's claim that he was being framed by informant and that informant planted evidence against him, in view of overwhelming evidence of guilt at trial, including identification evidence from four eyewitnesses, and cumulative and inconclusive nature of much of the withheld information. U.S.C.A. Const. Amend. 14.

6. Criminal Law ⇐641.13(1)

Accused claiming ineffective assistance of counsel must satisfy two-prong test by showing that counsel's performance was so deficient that he was not functioning as counsel guaranteed by Sixth Amendment, and that counsel's error prejudiced defense by depriving defendant of fair trial whose result is reliable. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(6)

Trial counsel's failure to interview informant and to call him as defense witness did not amount to ineffective assistance in capital murder prosecution, despite defense raised that defendant was being framed by informant; although counsel testified that he did call informant to testify due to his misunderstanding of state law regarding his ability to

Appendix A

ask leading questions, a reasonable, competent attorney would not have erred in failing to call the informant to testify due to perception that he was "loose cannon," and there was no reasonable probability that, but for any error, result in proceeding would have been different. U.S.C.A. Const.Amend. 6.

George W. Healy, III (court-appointed), Sheryl Bey, Phelps Dunbar, Gerard A. Rault, Jr., New Orleans, LA, for petitioner-appellant.

Jack C. Peebles, Harry F. Connick, Dist. Attys., New Orleans, LA, for Whitley.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before KING, HIGGINBOTHAM, and JONES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Curtis Lee Kyles, an inmate sentenced to capital punishment, appeals the judgment of the district court, denying him the writ of habeas corpus. In 1984, a Louisiana court convicted Kyles of shooting and killing Mrs. Dolores Dye during a daylight armed robbery before many witnesses. As he did before the jury that convicted and condemned him, Kyles asserts innocence and maintains that he was framed by a now-deceased acquaintance. Although phrasing his claims in constitutional terms, Kyles essentially asks this court to reconsider the defensive theory rejected by the jury nine years ago. We affirm.

Kyles alleged numerous constitutional violations in his petition for writ of habeas corpus. In a thorough, forty-six page opinion and order, the district court rejected all of them.* On appeal, Kyles narrowed his focus by briefing only two claims, under *Brady* and *Strickland*.[1] As a habeas court, we do not sit to rehear Kyles' trial. Nonetheless, because both *Brady* and *Strickland* analyses inquire into probable effects on trial outcomes, we begin by emphasizing this conclusion: a complete reading of the record demonstrates that Kyles faced overwhelming evidence of guilt. In particular, three eyewitnesses positively identified Kyles among a photographic lineup within 96 hours of the murder. Those three, joined by a fourth eyewitness, testified at trial that Kyles was definitely the gunman, even after comparing him with the man that Kyles contends framed him. None of the evidence offered by Kyles—or that he alleges he was prevented from offering—effectively undermined the powerful weight of this eyewitness testimony.

[1] We also note that the limited focus of a federal habeas court was recently emphasized when the Supreme Court held that "the standard for determining whether habeas relief must be granted is whether the ... error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, — U.S. ——, ——, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). This standard controls all trial, as distinguished from structural, errors—those whose impact may be quantitatively assessed in the context of other evidence in order to determine their effect on trial outcomes. *See Arizona v. Fulminante*, 499 U.S. 279, ——, 111 S.Ct. 1246, 1249, 113 L.Ed.2d 302 (1991).

I

On December 7, 1984, a Louisiana jury convicted Curtis Lee Kyles of first degree murder in violation of La.R.S. 14:30 and sentenced Kyles to death.[2] The conviction and sentence were affirmed on direct appeal by the Supreme Court of Louisiana in a published opinion. *State v. Kyles*, 513 So.2d 265 (La.1987), *cert. denied*, 486 U.S. 1027, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988). The Supreme Court of the United States denied Kyles' petition for a writ of certiorari on direct appeal. On January 2, 1989, Kyles commenced state habeas corpus proceedings by petitioning the state district court for a stay of execution, post-conviction relief, writ of habeas corpus, and a new trial based on newly-discovered evidence. This petition alleges that Kyles' constitutional rights had been violated in twenty ways. Following an evidentiary hearing ordered by the Louisiana Supreme Court, the state district court denied Kyles' motions and rendered judgment. In September 1990, the Louisiana Supreme Court denied Kyles' application for review of the judgment.

Soon after the state court set an execution date, Kyles commenced this habeas corpus proceeding in federal court pursuant to 28 U.S.C. § 2254. The federal district court reviewed the entire record, including the transcripts and pleadings from the trial court, direct appeal, and state collateral proceedings. Concluding that Kyles was given a fundamentally fair trial with able assistance by counsel, the district court denied Kyles' petition for writ of habeas corpus on March 24, 1992.

Kyles filed a notice of appeal on April 2, 1992. The district court issued a certificate of probable cause. After filing his notice of appeal, Kyles filed a Rule 60(b) motion for post-judgment relief in the district court, claiming newly-discovered evidence. We granted a motion to hold this appeal in abeyance pending the disposition of that motion. The district court denied the Rule 60(b) motion on June 2, 1992. On August 7, 1992, we vacated the district court's June 2, 1992 order and remanded with instructions to deny Rule 60(b) relief on the ground that a petitioner may not use a Rule 60(b) motion to raise constitutional claims that were not included in the original habeas petition. This appeal then proceeded.

II

At approximately 2:20 p.m. on September 20, 1984, Mrs. Dolores Dye, a sixty-year-old woman, was murdered in the parking lot at the Schwegmann Brother's grocery store on Old Gentilly Road in New Orleans. Testimony at trial established that a young black man accosted Mrs. Dye as she placed her groceries in the trunk of her red Ford LTD. One witness testified that the victim threw her purse into the trunk, slammed the lid, and tried to get away. The assailant grabbed her, they began struggling, and he wrestled her to the ground. Finally, the assailant drew a revolver from his waistband and fired it into Mrs. Dye's left temple, killing her instantly. The gunman then took Mrs. Dye's keys from her hand, got into the Ford LTD, and drove from the parking lot. After turning onto the street, a traffic light caused the LTD to stop beside a truck driver, Robert Territo, who had seen the shooting and then viewed the gunman's face at close range. Another witness, Isaac Smallwood, was working at the corner of the parking lot. The LTD drove close by him after it left the parking lot, allowing Smallwood to see the driver's face. Henry Williams was also working outside at the parking lot. He witnessed the struggle and murder and saw the gunman's face as the LTD passed slowly by on the street within twelve feet of him.

Police spoke to Smallwood, Williams, and three other eyewitnesses at the scene. Later, Territo and Darlene Cahill called police to report witnessing the murder. All of these witnesses described a young black man, who wore a dark-colored shirt, blue jeans, and his hair in plaits.

The investigation was aided on Saturday night, September 22, when Joseph "Beanie" Wallace informed officers that a man named "Curtis" had sold him a red Ford LTD. Using the address Beanie provided, police found Curtis Kyles' name and Beanie identified Kyles' photograph. Beanie stated that on Friday, he paid Kyles $400.00 for the LTD and drove it around New Orleans. Only later did he connect the car with the murder and call police. Detective John Miller testified during post-conviction proceedings that Beanie had spoken to him on previous occasions about various, unrelated shootings, although this case was the first time that Detective Miller could use Beanie's information because it was a homicide. Around midnight, Beanie led police to the car that Kyles sold him. Police soon established

* See Appendices A and B.

1. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2. A previous trial ended in a mistrial after four hours of deliberation because jurors could not reach an unanimous verdict regarding guilt or innocence.

that the LTD in Beanie's possession belonged to the victim.[3]

For security purposes, a police officer was wired to record this conversation. During it, Beanie informed officers that Kyles lived at 2313 Desire, the apartment of Kyles' common-law wife, Martina "Pinky" Burns.[4] Beanie claimed that Kyles had removed Schwegmann's grocery sacks from the LTD before turning it over to Beanie. Acting on this information, Detectives Lambert and Saladino went to Desire Street at 1:00 a.m., Monday morning, September 24. They picked up five identical plastic bags of garbage that had been placed outside Kyles' residence. Inside one of those garbage bags, police found the victim's purse, identification, and other personal belongings wrapped in a Schwegmann's paper grocery sack.

A search warrant for the Burns/Kyles residence had been issued at 6:07 p.m. on September 23. At approximately 10:40 a.m. the following day officers arrested Kyles outside the residence and searched the apartment. Behind the stove, they found a .32 caliber revolver that contained five live rounds and one spent cartridge. Ballistics tests later confirmed that this pistol was used to murder Mrs. Dye. In a chifforobe in another part of the residence, officers found a homemade shoulder holster that fit the murder weapon. They also discovered two boxes of ammunition in a bedroom dresser drawer. One box contained .32 caliber rounds of the same brand as those found in the pistol.

Back in the kitchen, pet food was found in Schwegmann's sacks located in a cabinet with pots and pans. No other human or pet food was located in that cabinet. Several cans of cat and dog food were discovered, including Nine Lives brand cat food and Kal-Kan brand dog food. No pets, however, were present in the household. Detective Dillman testified that police found no cat litter nor a litter box, although a photograph of the chifforobe shows a bottle labelled "Hart Flea." The victim's husband, Mr. Robert Dye, testified at trial that his wife usually purchased several brands for their cats and dogs, including Nine Lives and Kal-Kan.

Partial fingerprints were found on the victim's effects, but none was sufficient for an identification. No fingerprints were found on the murder weapon or in the LTD, but Kyles' prints were recovered from a Schwegmann's cash register receipt found on the floor of the LTD. The receipt's contents were illegible, making it impossible to read the items purchased or date, because the chemical process used to raise the fingerprints obliterated the ink.[5]

After Kyles became a suspect, Detective John Dillman prepared a photographic lineup. On Monday, September 24, Dillman showed the lineup to five eyewitnesses to the murder. Three of them instantly picked Kyles out from the array of photographs of young black men; another tentatively chose Kyles. These three witnesses, as well as a fourth eyewitness who was not asked to view the photographic lineup, also positively identified Kyles at trial as the gunman.

The defense contended at trial that the initial informant, Beanie, framed Kyles. While Kyles denied any involvement in the murder, his defense implied that Beanie was the murderer. After all, Beanie possessed the LTD when he spoke to police, and the defense theory accused Beanie of planting the victim's possessions and the murder weapon at Kyles' residence. Beanie did not testify at the trial for either the prosecution or the defense. Four defense witnesses—Kevin Black, Ronald Gorman,[6] Johnny Burns, and Kyles himself—testified that they saw Beanie in a red car similar to the victim's after the killing on Thursday, Septem-

3. The police agreed to pay Beanie $400.00 to compensate him for the amount that he had paid to Kyles for the car.

4. This name sometimes appears in the record spelled "Burnes." We use the term "common-law wife" loosely. Pinky was the mother of Kyles' four children, and he spent about four nights a week at her apartment on Desire Street.

5. Before the piece of paper was processed, the police had noted that it was a cash register receipt from Schwegmann's, but no other information regarding its contents was recorded.

6. Gorman admitted at trial to a felony conviction for armed robbery.

ber 20.[7] Defense witness Donald Powell stated that Beanie tried to sell him the LTD on Friday for $300. Johnny Burns testified that Beanie changed the license plates on the LTD Friday night, demonstrating that Beanie knew the car was stolen.

Central to defense was the theory that Beanie had planted the most incriminating evidence in Kyles' apartment and garbage. Defense witnesses testified that Beanie attended a gathering at Kyles' residence on Sunday night, September 23. The testimony of Kyles' friends and relatives conflicted as to the number of persons present and what dinner was served. Johnny Burns, Pinky's brother and so Kyles' brother-in-law, testified that during this evening he saw Beanie stooping near the stove. As noted, the murder weapon was found behind this appliance. Kyles also testified in his own defense. He denied owning the revolver and holster and stated that they must have been planted in the apartment. To explain the presence of .32 caliber rounds, Kyles stated that they were among ammunition he received when Beanie gave him a .22 caliber rifle as security for a loan. As a motive for the alleged effort to frame Kyles, the defense contended that Beanie was romantically interested in Pinky Burns, Kyles' common-law wife. Defense witnesses Cathy Brown and Carolyn Campbell said that they had witnessed Beanie make sexual advances to Pinky.

Kyles denied any involvement in the shooting of Mrs. Dye. To explain the Schwegmann's receipt bearing his fingerprints found in the LTD, Kyles stated that Beanie had picked him up in a red car on Friday and taken him to Schwegmann's, where Kyles purchased transmission fluid and a pack of cigarettes. He suggested that the receipt might have fallen from the bag when he removed the cigarettes. Kyles also testified that he had purchased the pet food found in his apartment at Schwegmann's on another occasion. Kyles claimed that he owned a dog, which was sometimes kept in Mississippi at his mother-in-law's home. He did not know where it was at the time of trial. He also stated that his son kept a cat and that they fed other stray cats. Other defense witnesses gave varying testimony as to whether or not Kyles or his children had a dog or cat. When asked why he had purchased "so much" pet food, Kyles responded that he had "because it was on sale" at Schwegmann's. On rebuttal, the prosecution called Schwegmann's director of advertising to testify. Examining the cans of pet food, he denied that these brands had been on sale, explaining that the prices marked on the cans were not marked-down sale prices. During the prosecution's case-in-chief, the victim's husband testified that Mrs. Dye usually purchased the same brands of pet food as those found in Kyles' residence.

During rebuttal, the prosecution recalled each eyewitness. Beanie was brought into the courtroom, giving each eyewitness a chance to view him and Kyles simultaneously. The jury could also compare Beanie with Kyles. Each of the eyewitnesses attested that Kyles, not Beanie, was the person who committed the murder.

The jury unanimously found Kyles guilty of first degree murder. During the sentencing phase, the prosecution relied upon the evidence adduced during the guilt phase. The defense sought mitigation by presenting evidence of Kyles' close familiar relations with his relatives and children. Kyles also reasserted his innocence. Finding the aggravating circumstance of a killing during the commission of an armed robbery, the jury unanimously recommended the death penalty.

At the post-conviction evidentiary hearing, Kyles asserted that prosecutors had failed to disclose *Brady* materials to the defense. A number of documents in the police file were not delivered to the district attorney's office until after Kyles' conviction. Kyles received them during post-conviction litigation and maintains that they were favorable and material to his defense.

7. Black, Gorman, and Burns admitted that they were friends of Kyles. Johnny Burns was his brother-in-law.

III

A. *Brady*

Kyles' principal claim is that the State withheld purportedly inculpatory material. In particular, he points to the following evidence that was not produced before trial: (1) the transcript of the recording of Beanie's first conversation with police officers; (2) a written statement signed by Beanie after police interviews; (3) notes taken by prosecuting attorney Cliff Strider during an interview with Beanie; (4) a police memorandum directing officers to pick up the garbage in front of 2313 Desire Street; and (5) a list of license plate numbers from cars parked at Schwegmann's on Thursday night, September 23.

1. Governing legal standard

[2, 3] Our concern as a habeas court is confined to reviewing for constitutional violations. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). The prosecution must also disclose evidence useful to the defense for impeachment. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). A successful *Brady* claim must show (1) the prosecution's suppression of evidence, (2) the favorableness of that evidence, and (3) the materiality of that evidence. *United States v. Sink*, 586 F.2d 1041, 1051 (5th Cir.1978).

The Supreme Court defined materiality in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). According to *Bagley*,

> evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 682, 105 S.Ct. at 3383 (Blackmun, J.); *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part). Writing for the Court, Justice Blackmun stated that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678, 105 S.Ct. at 3381.

[4] Kyles argues that *Bagley*'s analysis cannot be used in capital cases. We have previously rejected this general proposition. *See James v. Whitley*, 926 F.2d 1433, 1437 (5th Cir.1991). Kyles raises a slightly different argument than the one presented in *James*, by insisting that the alleged *Brady* violation affected not only the guilt determination, but his sentence as well. Thus, Kyles argues, Eighth Amendment considerations are triggered which require a stricter scrutiny than *Bagley*'s probable-effect inquiry. Kyles therefore urges this court to use the "no effect" standard found in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), or the "harmless beyond a reasonable doubt" standard referred to in *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). In this case, the only effect the alleged *Brady* materials could have had on his sentencing would be through residual doubt. Kyles presented no mitigating evidence other than his close relationships with his family. The State relied upon the aggravating factor of murder during an armed robbery, which the jury found proved beyond a reasonable doubt in the guilt phase. We are not persuaded that the Eighth Amendment forecloses using the *Bagley* standard, when the only effect of *Brady* material would be to enhance the possibility of residual doubt after a jury finds guilt beyond a reasonable doubt.

2. Review of the evidence

[5] We apply the *Bagley* standard here by examining whether it is reasonably probable that, had the undisclosed information been available to Kyles, the result would have been different. Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit.

a. Eyewitness testimony

The murder occurred around 2:20 p.m. in the parking lot of Schwegmann Brother's grocery store. Photographs of the crime scene taken that afternoon show a bright, sunny day. Many witnesses saw the murder, their attention prompted by the victim's screams, and then saw the gunman's flight in the victim's car. Three of the eyewitnesses later identified Kyles in a photographic lineup. At trial eleven weeks after the murder, four witnesses identified Kyles as the gunman. Significantly, during each eyewitness's rebuttal testimony, Beanie was brought into the courtroom. After viewing Beanie and Kyles simultaneously, each eyewitness once more identified Kyles as the murderer. Also, the members of the jury received four opportunities to view both Beanie and Kyles after hearing the witnesses' descriptions of the gunman.

Kyles tried to undermine these identifications by pointing to discrepancies between his hairstyle and that in descriptions of the gunman. Territo, for instance, described the gunman's hair as a "wooly type braid" or "matted braid". Defense witness Carolyn Campbell stated that Kyles always wore his hair in a "bush" style. Kyles testified that he never wore his hair in plaits or braids. On the other hand, the defense claimed that Beanie fit the descriptions. Kyles' friends Kevin Black and Ronald Gorman testified that Beanie wore braids in his hair on Thursday, September 20. Donald Powell claimed that Beanie usually wore braids, but a police photograph taken on June 6, 1984, shows that Beanie was wearing a Jherri curl fifteen weeks before the murder. Johnny Burns claimed that Beanie changed his hairstyle to a curl on Friday, September 21, after the murder.

Kyles contends that the first of the alleged *Brady* materials affects this identity issue. A police wire recorded Beanie's first conversation with police officers. This was done as a security measure, rather than as a means to preserve evidence. The transcript of this recording was not delivered to the prosecuting attorney before trial and not disclosed to Kyles. According to this transcript, after stating that "Curtis" sold him the LTD on Friday, Beanie said that Kyles wore his hair in a bush "that day." We do not agree that this statement made the transcript material and so mandated disclosure. The jury otherwise learned of the supposed discrepancy between descriptions of the gunman's hairstyle and Kyles' hairstyle. Beanie's statement adds nothing new and is itself not decisive. Even if Kyles wore a bush "that day"—Friday—he may have worn braids on Thursday. The transcript also contains Beanie's statement that Kyles sometimes wore braids.

Kyles also claims that a second set of undisclosed documents impeded his challenge to the eyewitness identifications. He did not receive written statements signed by Smallwood and Williams. Kyles maintains that the jury's confidence in the eyewitness identifications would have been undermined if the defense could have impeached these two men with inconsistent statements in the descriptions they gave to police just after the murder. Williams, for example, originally described the gunman as being around 5'5" with a medium build. Kyles is closer to six feet tall and is slender. Yet when shown Kyles picture four days after the murder, Williams immediately recognized him as the killer. Kyles argues more forcefully regarding Smallwood. At trial, Smallwood described witnessing the shooting itself. The original statement he signed, however, states that he turned to look after hearing the gunshot. This discrepancy, Kyles insists, shows that Smallwood embellished his story, perhaps after coaching. Kyles overlooks, however, that Smallwood consistently stated that the gunman then drove the LTD close by him. Smallwood always maintained that he got a good look at the killer then, and like Williams, immediately recognized Kyles in the photographic lineup. Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others.

To support the inference of mistake, Kyles cited testimony that he and Beanie resembled one another. Defense witness Ronald Gorman, for instance, stated that Beanie and Kyles resemble each other "a little" in profile. Gorman admitted, however, that the

two men's sizes and builds were not alike. Johnny Burns also testified that the two men look alike from the side and had similar complexions. This testimony is belied, however, by the finding of the state trial court, during post-conviction proceedings, that Beanie "distinctly did *not resemble*" Kyles. Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face. More importantly, the eyewitnesses and the jury were allowed to compare Beanie and Kyles. After doing so, Smallwood stated, "they don't look nothing alike to me." Each eyewitness repeated their conviction that Kyles was the gunman they saw at Schwegmann's.

We note that none of the undisclosed documents bear on the credibility of eyewitness Territo's testimony. Territo observed Kyles and Mrs. Dye struggle, and witnessed the shooting itself. Then, as Kyles drove away in the LTD, he stopped at a red light in the lane next to Territo. As Kyles looked around, Territo got a good look at his face from a short distance away. Territo positively identified Kyles as the gunman in a photographic lineup four days after the murder, and positively identified Kyles at trial twice—the second time after seeing Beanie and Kyles together. There is no evidence in the record that Territo made inconsistent statements at any time.

The theory that Beanie framed Kyles cannot explain the eyewitnesses' positive identifications. Kyles must assert that all four of them were mistaken. At trial, Kyles' counsel elicited from the eyewitnesses that they had previously seen Kyles in the courtroom.[8] The defense suggested that the in-court identifications resulted from Kyles' presence at the defendant's table, reinforced by viewing him there on prior occasions. This implication, however, could not weaken the three out-of-court identifications. Territo, Smallwood, and Williams each selected Kyles from among six similar photographs. There is no evidence that these photographic lineups, four days after the murder, were conducted improperly. Kyles can make no response but the improbable assertion that each witness coincidentally made the same mistake. We must bear this weighty evidence of guilt in mind while assessing the probable effect of other undisclosed information on the jury's verdict.

b. Tangible evidence

While the eyewitness identifications are convincing, Kyles is also faced with the great deal of incriminating evidence found in the apartment where he usually resided. The defense must also discount much of this evidence as coincidental. The remainder, however, Kyles attributes to Beanie's alleged effort to frame him.

Kyles maintains that the nondisclosure of the transcript also weakened his ability to establish Beanie's motives for framing him. The transcript assertedly contains three statements that may do so. First, in describing the trip to retrieve Kyles' car from the Schwegmann's parking lot, Beanie referred to the part of the lot where the murder had taken place. Kyles would infer from this statement Beanie's knowledge of, and hence involvement in, the murder. Second, Beanie described driving around New Orleans in the stolen LTD and his concern that he might be arrested because of this possession. These statements, Kyles argues, lead to one motive: that Beanie framed Kyles in order to escape prosecution himself for murder, complicity in murder, or dealing in stolen goods. Finally, the transcript reveals that Beanie requested $400 as reimbursement for the amount he paid Kyles for the stolen LTD. Kyles translates this statement into another motive by arguing that Beanie framed him to get a monetary reward.

At trial, Kyles elicited testimony supporting these two motives, as well as a third: that Beanie framed Kyles so that Beanie could pursue his romantic interest in Pinky Burns. The principal thrust of the defense case was that Beanie committed the murder. During cross-examination, Detective Dillman testified that Beanie possessed Mrs. Dye's LTD. Defense witnesses testified that Bean-

8. Counsel implicitly referred to the first trial and suppression hearing. The jury was not informed of the prior trial.

ie fit the gunman's description. The presence of the murder weapon was attributed to Beanie's visit to Kyles' apartment. We are not persuaded that Beanie's reference to the scene of the murder adds significant weight. The transcript also reveals that Beanie followed news accounts of the crime after they alerted him to the connection between the LTD and the murder. As to a pecuniary motive, Detective Dillman told the jury that Beanie received $400 after giving his tip. Beanie's request for the money on the transcript would have been cumulative, at best.

As further support for the defense theory, Kyles elicited testimony from the police that stolen license plates were on the LTD when it was found. Johnny Burns testified that he saw Beanie change the plates. The defense maintains that this evidence dispels any notion that Beanie was the unwitting bona fide purchaser of a stolen car. Once more, Kyles claims that the jury would have attached more significance to this evidence if the State had disclosed the transcript. It is true that on the transcript Beanie did not deny placing stolen plates on the LTD, even as officers made statements to that effect, but the state never urged and no prosecution witness ever stated that Beanie was an innocent buyer. The State did not call Beanie as a witness, nor inform the jury of the contents of his initial tip to police. Thus, the character or credibility of the informant was not presented to the jury by the prosecution.[9] Beanie's tip served only to explain why police showed Kyles' photograph to the eyewitnesses. The defense established that Beanie had possession of the LTD and that it bore stolen plates. A witness testified that Beanie placed them on the car. Thus, Kyles did lay the foundation for inferring that Beanie was not an unwitting buyer of stolen goods, but rather a knowing possessor who might have been the robber. On the other hand, proof that Beanie changed the plates is not inconsistent with Kyles' guilt. Ultimately, this evidence is at best cumulative on a factual point not rebutted by the State. The nondisclosure of this much of the transcript was insignificant.

9. This factor is discussed further *infra*, section III.B.

Kyles also complains that the failure to disclose the transcript, and two other documents containing statements by Beanie, impaired his defense by preventing him from showing inconsistencies among those statements. After the recorded conversation shown by the transcript, Beanie went to police headquarters and signed a typewritten statement in the early morning hours of Sunday, September 23. Sometime later, before Kyles' trial and conviction, prosecuting attorney Cliff Strider interviewed Beanie and wrote several pages of notes regarding Beanie's statements at that time. Neither Beanie's written statement nor Strider's notes were disclosed to the defense before trial. Kyles claims that the defense could have furthered its case by informing the jury of inconsistencies, principally between the first two statements and Strider's notes.

In the first two statements, Beanie described this sequence of events: on Friday evening, September 21, Kyles sold the LTD to Beanie. Beanie then saw Kyles unload Schwegmann's grocery sacks and a purse from the LTD and place them in his apartment at 2313 Desire Street. After 9:00 p.m., Beanie accompanied Kyles and others to the Schwegmann's parking lot, where they retrieved Kyles' own car. Prosecutor Strider's notes generally reflect the same events, but the dates, sequence, and some details changed. According to the notes, Beanie and Kyles retrieved Kyles' car from Schwegmann's on Thursday, at 7:45 p.m., rather than Friday after 9:00 p.m. Then, Beanie saw Schwegmann's sacks and a purse taken, not from the LTD, but from an apartment, whence they were taken to Kyles' apartment. The notes then state that Beanie purchased the LTD after the events, on Friday morning, rather than Friday evening.

The date of Strider's interview and notes is not disclosed by the record. Thus, the time span between the first two statements and this interview is unknown and the relative weight of the discrepancies is difficult to gauge. This is but one problem. More importantly, evidence that Beanie lacked credibility would have had little impact on this case. The prosecution did not call Beanie as

a witness, nor vouch for the reliability of the tip that he gave police. Instead, the State mentioned this tip in passing, to explain why it focused on Kyles as a suspect and discovered evidence conclusively linking him to the murder.

While the defense portrayed Beanie as framing Kyles, it did not call Beanie as a defense witness. As we will explain in Section III.B., that decision was sound.[10] Calling Beanie as a witness threatened to do Kyles more harm than good, even if the defense could show that details of Beanie's claims were not consistently stated. Since Beanie did not testify, and there was no constitutional compulsion that he should have been, the failure to possess impeachment evidence material could not, in reasonable probability, have affected the outcome of the trial. Kyles has not shown on this basis that the three statements were material.

Detective Lambert testified during cross-examination that he picked up Kyles' garbage bags from the curb without apparent detection. Kyles' residence was not under police surveillance until after sunrise the following morning. The defense counsel used this cross-examination to establish that someone could just as easily have placed bags in that location, or put Mrs. Dye's purse into bags already there. The defense maintained that Beanie did so. Kyles now asserts that he could have argued this point more powerfully with two pieces of alleged *Brady* material. One was a police memorandum directing officers to pick up Kyles' garbage. The memo stated, "[w]e have reason to believe the victim's personal papers and the Schwegmann's bags will be in the trash." According to Kyles, Beanie was the person who gave the police reason to believe that this evidence would be found. Kyles supports also this assertion with the transcript. In it, a police officer refers to Beanie having stated that if Kyles were smart, he would throw the items from the LTD into his garbage. Kyles argues that these documents would have strengthened his theory that Beanie planted the purse in Kyles' garbage and directed the police to find it there.[11]

Even without these documents, Kyles made a credible case that Beanie could have planted this evidence. It was undisputed at trial that *anyone* could have had access to garbage bags sitting on the curb and that Beanie was attempting to incriminate Kyles. Kyles was able to argue that Beanie had one or more motives and an opportunity to plant this evidence where the police found it. Nonetheless, the jury rejected this argument. These documents might have offered some assistance to Kyles. In light of the entire record, however, we cannot conclude that they would, in reasonable probability, have moved the jury to embrace the theory it otherwise discounted.

To explain the murder weapon and holster, the defense depended upon testimony that Beanie had attended a gathering at Kyles' apartment on Sunday night, September 23. Several defense witnesses stated that Beanie was present at 2313 Desire that evening, and had dinner with Kyles and others. Johnny Burns stated that as many as 18 people attended the gathering, while Cathy Brown remembered six being present. The State questioned the credibility of these witnesses, given inconsistencies among their statements, but presented no testimony that this gathering did not occur. Asserting yet another *Brady* violation, Kyles points to the notes of prosecutor Cliff Strider's interview with Beanie. These notes refer to Beanie's presence at Kyles' apartment for Sunday dinner. Corroborating Beanie's presence, however, adds little credibility to an assertion that Beanie smuggled evidence in and hid it about the apartment on that occasion.

Johnny Burns claimed that he came upon Beanie alone in the kitchen, stooping next to

10. As the dissent maintains, the *Brady* and *Strickland* claims are related, at least in part. In Section III.B., we conclude that defense counsel was not deficient in deciding not to call Beanie to testify. Beanie did not testify and impeachment material did not affect the trial. Our *Strickland* holding thus supports our *Brady* decision.

11. Kyles also argues that knowledge of these statements would have led defense counsel to call and cross-examine Beanie regarding the garbage bags. For reasons stated *infra*, section III.B., we fail to see how Beanie's testimony would have assisted Kyles.

the stove under which the murder weapon was found. During the state post-conviction hearing, the same trial court judge who presided over Kyles' trial found that Johnny Burns' testimony was not credible. "This Court, having had the opportunity to view Mr. Burns on the witness stand and to hear his testimony, has chosen to totally disregard everything that he has said."[12] This trial court finding of fact is fairly supported by the record and must be presumed to be correct. 28 U.S.C. § 2254(d). Even aside from § 2254, appellate courts must give due regard to the credibility determinations of trial judges, who enjoy the advantage of observing demeanor. *See Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). Given that Johnny Burns' testimony lacked credibility, it is unlikely that the jury attached much weight to his claims.

Kyles testified that Beanie offered to sell him a pistol with tape wrapped around it that evening. The murder weapon, however, showed no signs of having been wrapped in tape. This testimony added nothing to the theory that Beanie planted the evidence.

If Beanie was present at Kyles' apartment on Sunday, this opportunity to plant evidence came *after* Beanie had contacted the police and implicated Kyles. If Beanie had been bent on framing Kyles, it was risky indeed to direct officers to the residence on Desire Street before he planted the evidence. Beanie did not know when the police might move. Indeed, he did not plant the gun until the night of the day following his disclosure to the police. The defense theory attributes cleverness to Beanie in every detail *except* this one. Once again, we conclude that the undisclosed documents would have been essentially cumulative on a point that the prosecution questioned, but did not rebut. We are not persuaded that these notes were material.

Kyles complains that he did not receive a computer printout containing a list of automobile license plates. This printout listed cars that were in Schwegmann's parking lot at 9:15 p.m. on the day of the murder, September 20. The list does not include Kyles' automobile. Beanie's initial statements to the police indicated that Kyles had retrieved his car from Schwegmann's on Friday. Using a photograph of the crime scene taken Thursday afternoon, the prosecution argued that Kyles car was visible at a distant edge of the lot. Kyles argues that the undisclosed printout would have rebutted this evidence, showing the jury that his car was not present at the crime scene.

During post-conviction proceedings, Detective John Miller testified that not all vehicles were included in the canvas and license check that produced the printout. Thus, the printout did not disprove that Kyles' car was present at 9:15 p.m. Moreover, a list of cars found at 9:15 p.m. could not disprove that Kyles' automobile is the one visible in the photograph taken at the crime scene roughly six hours earlier.[13] Although the prosecution used the photograph to establish how Kyles arrived at Schwegmann's, before departing in the stolen LTD, no witness stated that Kyles' car remained there overnight. Thus, the printout was not inconsistent with the State's proof of guilt. More importantly, of course, we are not persuaded that it would, in reasonable probability, have induced reasonable doubt where the jury did not find it. The evidence of guilt was otherwise so overwhelming that the rebuttal of the photograph would have made no difference.

Finally, in assessing the probable effect of nondisclosure on Kyles' trial, we must consider evidence of guilt that is untouched by the alleged *Brady* violations. First, we consider the ammunition found in his apartment. Kyles claimed that Beanie gave him the two boxes of ammunition along with a .22 caliber rifle as security for a loan. He had loaded .22 caliber rounds into the rifle and left the other assorted ammunition in the boxes. He

12. Between the time of Kyles' conviction and the post-conviction hearing, the same trial court judge presided over the trial and conviction of Johnny Burns for the 1986 shooting death of Joseph "Beanie" Wallace. *See State v. Burnes*, 533 So.2d 1029 (La.Ct.App.1988).

13. As Kyles has seized upon in these proceedings, prosecuting attorney Strider's notes reflect that Beanie and Kyles retrieved Kyles' car from the Schwegmann's parking lot at 7:45 p.m. on Thursday.

testified that Beanie often had guns, accounting for the other calibers, including the large number of .32 caliber rounds. While the evidence seized included mixed caliber rounds in one box, another box contained only .32 caliber cartridges. It makes sense that Beanie would have given Kyles a container holding .22 ammunition, along with other rounds, at the same time that he gave Kyles a .22 rifle. It is not clear, however, why someone would also have given Kyles a box containing only .32 caliber rounds if Kyles did not own a .32 caliber firearm. The more likely inference, apparently chosen by the jury, is that Kyles possessed .32 caliber ammunition because he possessed a .32 caliber firearm. As noted, these rounds were the same brand as those found loaded in the murder weapon found in Kyles' residence.

It must not be forgotten that Kyles had to explain his possession of every piece of the incriminating evidence. Yet, no undisclosed document lessens the impact of the evidence regarding pet food from Schwegmann's. Kyles tried to account for its presence, but likely did his cause more harm than good. Kyles testified that he purchased at Schwegmann's the pet food found in his apartment. He must dismiss as coincidence the fact that Mrs. Dye usually purchased the same brands that he claimed to have chosen on one occasion because they were "on sale." In the first place, the weight of his explanation was undermined by his inability to explain what pets he planned to feed. He claimed to have kept a dog in the backyard, although it was sometimes kept in the country. Kyles stated that he had brought it home shortly before the murder. Police, however, found no sign of this pet. A friend of Kyles, Donald Powell, had not seen the dog for six months. When asked to explain why he purchased different brands of cat food, Kyles claimed that one was for his son's cat, the other for strays. He did not explain any reason, such as a lower price for the latter, for making this distinction.[14] Most importantly, Kyles' explanation for the choice and quantity suffered a devastating attack from the State when it called Schwegmann's director of advertising. The brands found in Kyles' residence were not "on sale" in September 1984.[15] During post-conviction proceedings, the state trial court cited this rebuttal evidence in concluding that Kyles had perjured himself at trial, and opined that the jury was moved to disregard the defense's theory when Kyles' testimony was thus discredited.

As the state trial court found, in post-conviction proceedings:

> the Defense was given ample opportunity, and successfully placed before the jury through credible evidence, the basic premise of the Defense's case, that Joseph [Beanie] Wallace was in fact that killer of Mrs. Dye and that Joseph Wallace "framed" the defendant for this killing....
>
> The jury was more than adequately exposed to the possibility that Joseph Wallace was in fact the killer.

The jury, however, refused to believe this testimony or to infer even reasonable doubt from it. Kyles received a fair trial, one whose outcome is reliable. Kyles failed to undermine the overwhelming evidence of guilt at trial, and we are not persuaded that it is reasonably probable that the jury would have found in Kyles' favor if exposed to any or all of the undisclosed materials. Often cumulative and generally inconclusive, the facts therein simply do not add enough to his case.[16]

14. In contrast, the victim's husband explained that their finicky cats would not eat the same brands, causing them to purchase a variety.

15. The effort to recast Kyles' explanation as meaning "for sale" rather than "on sale" makes no sense in context. All brands of pet food were "for sale," so that interpretation cannot explain why Kyles choose Kal-Kan and Nine Lives. Nor would it explain why he brought home more than a dozen cans at one time for two family pets. The common meaning of "on sale"—marked down—would provide such explanations, but was contradicted by the Schwegmann's employee.

16. Judge King attaches significance to the fact that Kyles' first trial resulted in a mistrial. The first jury deadlocked in this capital case in just four hours. We can only speculate as to the reason. While some jurors may have seen the prosecution's case as weak, it is also possible that a juror's concerns about capital punishment promptly caused the intractable disagreement. We attach little significance to an event whose cause is unknowable, and rely instead upon our review of the record, as informed by the judgments of the state trial court and district court. Whatever the proof offered in that trial, this transcript contains overwhelming evidence of guilt.

Finally, we note that *Brady* claims are subject to harmless error review. *See United States v. Garcia*, 917 F.2d 1370, 1375 (5th Cir.1990). Since Kyles has failed to show that it is reasonably probable that the nondisclosure of documents affected the outcome of his trial, we will not address whether he can show the actual prejudice of a substantial and injurious effect on the verdict. *See Brecht v. Abrahamson*, — U.S. —, —, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993).

B. *Strickland*

[6, 7] Kyles also contends that he received ineffective assistance of counsel at trial. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Kyles points to two principal errors allegedly committed by his trial counsel: failing to interview Beanie and failing to call Beanie as a defense witness. Under *Strickland*, Kyles must satisfy a two-prong test by showing that: (1) counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment, and (2) counsel's errors prejudiced the defense by depriving the defendant of a fair trial whose result is reliable. *Id.* at 687, 104 S.Ct. at 2064. To demonstrate professional deficiency, Kyles must show that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064. Given the difficulty of this evaluation and the distorting effect of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. at 2065 (internal quotation omitted).

Kyles' trial counsel was Martin Regan. Kyles maintains that Regan's failure to call Beanie—coupled with the prosecution's nondisclosure of the contents of Beanie's statements—prevented the defense from attacking Beanie's credibility. The prosecution's case, however, did not depend upon Beanie's credibility. The State did not call Beanie to testify against Kyles. Prosecution witnesses did not mention Beanie by name except in response to the cross-examination by Regan. Regan asked eyewitnesses whether they had been shown Beanie and questioned Detective Dillman about him. Then, during redirect testimony, Dillman admitted that the police had no suspect until after Beanie contacted them on Saturday, September 24. During his direct examination, Dillman had only alluded to Beanie's statements by testifying that officers received information that led them to Mrs. Dye's car, and that caused them to suspect Kyles. Leaving this testimony unelaborated, the prosecution depended upon the eyewitness identifications and the tangible evidence to link Kyles with the murder.

Of course, the defense did involve Beanie in the case by presenting the theory that Beanie had a motive to frame Kyles and an opportunity to plant evidence on his premises. Regan's questions laid the foundation supporting this theory. Regan did not, however, call Beanie as a defense witness. As a matter of trial strategy, the choice of witnesses enjoys a presumption of reasonableness. *Cf. Rivera v. Collins*, 934 F.2d 658, 660 (5th Cir.1991) (rejecting *Strickland* claim asserting counsel failed to call important witnesses). We are not persuaded that the decision not to call Beanie was an unreasonable one outside the bounds of professional judgment. To the contrary, the dangers of calling Beanie as a defense witness are very evident. As the district court put it, any reasonable attorney would perceive Beanie as a "loose cannon." According to the defense theory, Beanie was intent on seeing Kyles convicted for the murder of Mrs. Dye. Beanie's testimony almost certainly would have inculpated Kyles.[17] All of his statements to the police claimed that Kyles had possessed the LTD, sold it, and removed several Schwegmann's grocery sacks from

17. No reasonable attorney, believing that Beanie framed his client for murder, would have expected Beanie to take the stand and—as the district court said—give a "Perry Mason confession."

it—testimony not presented to the jury during the prosecution's case-in-chief. The only exculpatory effect Beanie could have was an indirect one: Kyles maintains that competent counsel, armed with Beanie's prior statements, would have thoroughly impeached Beanie's credibility. At the same time, competent counsel would realize the risk that if Beanie's credibility were not *completely* destroyed by his demeanor and prior statements, then his incriminating testimony would have strengthened the prosecution's case. The cross examination of Beanie had to face the reality that his version was supported by disinterested eye witnesses. Only hindsight allows one to say that Kyles had nothing to lose and that counsel should have taken that risk. *See United States v. Lauga*, 762 F.2d 1288, 1291 (5th Cir.1985) (decision not unreasonable just "because 20/20 hindsight and knowledge of the intervening conviction might lead another attorney to opt otherwise").[18] Beanie was a two-edged sword, and we conclude that Regan did not act unprofessionally in choosing not to draw that weapon at trial.

During post-conviction hearings, Regan stated that the reason he did not call Beanie to testify was his misunderstanding of Louisiana evidence law. He believed that if the defense called Beanie, he would not be able to ask leading questions unless he demonstrated both surprise and hostility. That belief was erroneous,[19] thus Kyles contends that a decision made on that mistaken basis was a professional deficiency. The Strickland analysis, however, judges the conduct of the defense according to the objective standard of the reasonable attorney. For the above-stated reasons, we conclude that a reasonable, competent attorney would not have erred in failing to call Beanie to testify and therefore the actual cause of trial counsel's failure to do so is not controlling.

Furthermore, the record demonstrates that Regan seriously considered calling Beanie. The defense placed Beanie under subpoena during the trial. *See State v. Kyles*, 513 So.2d 265, 273 (La.1987). During the post-conviction hearing, prosecuting attorney Strider testified that Regan discussed calling Beanie as a defense witness with him. The defense, however, had no guarantee about Beanie's behavior. Strider told Regan that he was not sure Beanie's attitude would be hostile. Moreover, Strider stated his belief that Regan expected the prosecution to call Beanie to testify during rebuttal, giving Regan a certain opportunity to lead and impeach the witness. Having considered the issue, Regan made a reasonable choice, and an appropriate one even if he correctly understood the applicable evidentiary rule.

Since Beanie did not testify and we are not convinced that he should have been called to testify, Regan's failure to interview Beanie had no apparent bearing on the conduct of the trial. It is not evident how interviewing Beanie would have allowed Regan to attack the prosecution's case more effectively, since that case did not rely upon Beanie's statements. An error by counsel does not satisfy the prejudice element of *Strickland* unless the defendant shows a reasonable probability that, but for the error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Regardless of whether the failure to interview Beanie constituted a professional deficiency, the requisite prejudice has not been shown.

Finally, Kyles suggested that Regan's failure to interview the eyewitnesses prior to trial led to ineffective assistance. One month before the trial, however, defense counsel cross-examined three of those four witnesses during the pretrial suppression hearing. Territo, Smallwood, and Williams testified at the suppression hearing because they made

18. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

19. In dicta in the direct appeal decision, the Louisiana Supreme Court stated that Beanie "was clearly a witness hostile to the defendant, and defense counsel was entitled to employ leading questions and to impeach the witness through any prior inconsistent statements." *State v. Kyles*, 513 So.2d 265, 273 (La.1987).

out-of-court identifications based upon a photographic lineup. We agree with the district court's conclusion that this hearing gave counsel an adequate opportunity to explore these witnesses' stories. Since counsel was not unprepared for the eyewitness testimony at trial, there is no probability that this alleged failure had an impact on the outcome.

IV

In conclusion, we iterate that trial counsel presented Kyles' theory that Beanie framed him. The defense suggested motives, with claims of Beanie's sexual interest in Kyles' common-law wife and by implying Beanie's own guilt for the murder. Counsel established that Beanie could have had access to Kyles' garbage bags on Desire Street. Defense witnesses claimed that Beanie came to Kyles' apartment on the night before the police search, and Johnny Burns testified to seeing Beanie stooping near the stove under which the murder weapon was found. The defense proposed the inference that Beanie framed Kyles. We are not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense. Rather, the jury rejected his defensive theory and viewed the overwhelming incriminating evidence as proof of Kyles' guilt. We are not empowered to substitute our own judgment or sense of fairness for the jury's.

AFFIRMED.

KING, Circuit Judge, dissenting:

With deference to my distinguished and able colleagues in the majority, I dissent from their affirmance of the district court's denial of the writ of habeas corpus. For the first time in my fourteen years on this court—during which I have participated in the decision of literally dozens of capital habeas cases—I have serious reservations about whether the State has sentenced to death the right man. My reservations are directly relevant to the two main constitutional claims that Kyles has raised—an ineffective-assistance-of-counsel claim[1] and a *Brady* claim.[2] Both claims are governed by a standard that asks whether there is a "reasonable probability" that, but for the constitutional infirmities at trial, "the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (citing *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068). A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Id.*

An exhaustive examination of the entire record in this case was necessary to properly assess my degree of confidence in the verdict. After such a review—of both evidence introduced at trial and the evidence that should have been presented—I conclude that Kyles has shown both that his trial lawyer was constitutionally ineffective and that the State failed to disclose material exculpatory and impeachment evidence. Individually, and particularly when taken together, these two constitutional violations have undermined my confidence in the jury's verdict. Unlike the majority, I believe that, when the constitutional violations in this case are considered, there is by no means "overwhelming evidence" of Kyles' guilt.

I.

What follows is a detailed summary of the facts garnered from the record,[3] paying due deference to the Louisiana Supreme Court's opinion on direct appeal, the state trial court's findings of fact issued in denying Kyles' petition for state habeas relief, and the federal district court's findings of fact issued in denying Kyles' petition for federal habeas relief.[4]

A. Events leading up to trial

At approximately 2:00 p.m. on Thursday, September 20, 1984, Dolores Dye, a sixty

1. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

3. Except as specifically noted, all of the evidence discussed herein was adduced and thoroughly explored at the state court post-conviction evidentiary hearing.

4. *See* 28 U.S.C. § 2254(d); FED.R.CIV.P. 52.

year-old white female, finished her shopping at a Schwegmann Bros. grocery store in New Orleans.[5] As she walked to her car in the store's parking lot, she toted a number of bags of groceries and her purse. According to police statements taken from eyewitnesses, after Mrs. Dye placed some or all of her groceries and her purse into the trunk of her red two-door Ford LTD, a young black man approached her and a struggle ensued, apparently over the keys to Mrs. Dye's car. The assailant wrestled her to the ground. When Mrs. Dye screamed and attempted to escape, the robber grabbed her arm, drew a small dark colored revolver from his waistband, and fired it into her left temple, killing her instantly.[6] The gunman then took the keys from Mrs. Dye's hand, ran to her car, and drove away.

There were a number of eyewitnesses to the crime. New Orleans police took contemporaneous witness statements from at least six persons, statements which were first provided in connection with the state court post-conviction evidentiary hearing.[7] Almost all of the witnesses stated that the murderer was a black man with hair variously described as "platted," "in platts," or "braided," as distinguished from a combed-out "Afro" hair style. Certain discrepancies in the various statements are notable.[8]

New Orleans police had no leads until the following Saturday, September 22, 1984—two days after the murder—when Joseph "Beanie" Wallace[9] informed police investigators that he could supply them with a valuable lead in the Dye murder regarding a man only identified as "Curtis."[10] Detective Ray Miller and his supervisor, Sergeant James Eaton, met with Wallace at approximately 11:00 p.m. in the same general neighborhood where the murder occurred. In a lengthy tape-recorded conversation[11] that was first made known to the defense during the state court post-conviction proceedings, Wallace told Miller and Eaton that he (Wallace) lived with Curtis' brother-in-law, whom Wallace repeatedly described as his "partner."[12] According to Wallace, on the previous day, Friday, September 21, 1984, he had purchased a red Ford LTD from Curtis for $400 at approximately 6:00 p.m. Wallace stated that Curtis had not confessed to the murder and, in fact, had never even told Wallace that the car was stolen. However, Wallace stated that his relatives had informed him that the local newspapers and television had reported the Dye murder and had also shown pictures of the red Ford. Hence, Wallace stated, this discovery prompted him to contact the police.[13] In response to police questioning,

5. Schwegmann Bros. is a large chain of grocery stores, many of which are located in New Orleans.

6. The bullet was later determined to have been fired from a .32 caliber pistol.

7. Those statements were taken from Edward Williams, Isaac Smallwood, Lionel Plick, Robert Territo, Willie Jones, and Henry Williams. Of those persons, only Smallwood, Territo, and Henry Williams testified at trial.

8. Isaac Smallwood described Mrs. Dye's assailant as "a black man . . . [about 17 or 18[.] He was dark complexted [sic][.] He had a light moustache, and braided hair. The braids looked like they went down to his shoulders." Lionel Plick described the assailant as being "about in his 20's[.] He was about 5'10" tall, slender build. . . ." Robert Territo similarly described the murderer as "about twenty-eight years old, close to six feet tall, slim build, dark skinned. . . ." Willie Jones described Mrs. Dye's assailant as "a black male, about seventeen or eighteen years old[.] He was about five feet-nine inches tall and weighed about one hundred and forty pounds. He was dark skinned and his hair was platted." Henry Williams described the assailant as "a black male, about 19 or 20 years old, about 5'4" or 5'5", about 140 to 150 lbs., medium build, dark complexion, his hair looks like it was platted, it was short."

9. In his conversation with the police, Wallace assumed one of his various aliases, "Joseph Banks."

10. "Curtis" was later identified as Curtis Lee Kyles.

11. Wallace was not aware that the conversation was being recorded.

12. That person was later identified as Johnny Burnes, the brother of Curtis Lee Kyles' common-law wife or girlfriend, "Pinky" Burnes.

13. In their habeas corpus pleadings, the State has claimed that Wallace had previously served as a police informant; however, the tape-recorded conversation reveals that the New Orleans police not only were unaware of Wallace's true

Wallace described Curtis as a tall, "real skinny" black man, approximately twenty-five years old, "with a bush" hair style.[14]

Wallace also claimed that on the same Friday, he, Curtis, and Curtis' brother-in-law had unloaded numerous bags of Schwegmann Bros.'s groceries and a woman's brown purse from the stolen red car's back seat and trunk. According to Wallace, they then placed the items in the home of Curtis' common-law wife, "Pinky" Burnes, where Curtis frequently stayed.[15] Wallace claimed that they later went to Schwegmann Bros.'s parking lot at approximately 9:00 p.m. on Friday in order to retrieve Kyles' automobile, which Wallace described as an orange Ford.[16] Wallace further stated that "I betcha I can get in a lot of trouble with this shit, huh," to which the police officers responded by repeatedly assuring Wallace that he would not be arrested and that, to the contrary, Wallace had done "the right thing." Wallace stated that his fear stemmed from the fact that he had been seen driving Mrs. Dye's car on Friday night through the French Quarter of New Orleans. Wallace also admitted that he had changed the license plates on Mrs. Dye's car.[17] Later in the conversation, Wallace became more confident, reminding the police that "I ain't doing all this for nothing, you know." The police responded by repeatedly promising that Wallace would not lose the $400 that he claimed he paid for the car as a result of the police's confiscation.

Also noteworthy in the tape-recorded conversation was Wallace's eagerness to help the police build a case against Curtis Lee Kyles. Wallace stated that Kyles regularly carried two handguns, a .32 and a .38 caliber. Wallace admonished Detective Miller that "*if you can set him up good*, you can get the same gun" that was used to kill Mrs. Dye. (emphasis added). Wallace also accompanied the police to Schwegmann Bros., where Wallace showed police the location where Curtis had supposedly parked his car, which was not retrieved until the day after the murder, according to Wallace. Wallace specifically pointed out that the car was parked "on the same side where the woman was killed at." He also claimed that Curtis "had a brown pocketbook" or "purse"[18] that he retrieved from the bushes at Schwegmann Bros. Wallace pointed to bushes where Curtis had allegedly retrieved the purse. Wallace claimed that "he's [Curtis] got it . . . at home [in a] chifferrobe [sic]." Wallace informed

name but also of his criminal history. In response to police questioning, Wallace claimed that he had been arrested only once, for "fighting." In fact, as was revealed at the state court post-conviction hearing, Wallace had been convicted as an accessory to another robbery/murder in New Orleans in the early 1980s. The habeas record also contains a transcript of a police interview with Wallace that was recorded four days after Curtis Lee Kyles was sentenced to death for the murder of Dolores Dye. In that statement, Wallace confesses that he participated in an unrelated 1984 robbery/murder of an elderly woman in her New Orleans home. Wallace admitted that it was his handgun that was used to kill the other woman, but denied that he was the triggerman. Wallace was never prosecuted for his involvement in that murder.

14. At one point in the conversation, Wallace described Curtis as wearing a "bush" generally; he also specifically described Curtis as wearing a "bush" on the day on which Curtis allegedly sold the car to Wallace. In response to specific police questioning, Wallace also stated that Curtis would sometimes wear his hair in plaits.

15. At trial, numerous witnesses referred to the relationship as a common-law marriage. Kyles is also the father of five of Pinky Burnes' children. Although he often spent the night at other locations, Kyles spent a substantial portion of his time before his arrest cohabitating with Pinky Burnes at the apartment which she leased.

16. At trial, there was evidence that Kyles in fact owned a rust-colored Mercury.

17. Although the State, at trial and afterwards, has consistently disputed that Wallace in fact changed the plates, the tape recording makes it clear that Wallace did change the plates. In response to a question from Detective Miller asking "[y]ou changed the plates on it, huh," Wallace sarcastically responded "[y]ou never know." Later in the conversation, Detective Miller repeatedly informed other police officers that "[h]e changed the plate"—statements in which Wallace fully acquiesced. Furthermore, as discussed, *infra*, in a subsequent conversation between Wallace and the chief trial prosecutor, Cliff Strider, Wallace again admitted that he had changed the plates.

18. Wallace originally referred to it as "pocketbook" but, when asked by the police, stated that it was in fact a "purse . . . like a purse." I observe that the record contains a photograph of

Sergeant Eaton that Curtis' "garbage goes out tomorrow" and "if [Curtis] is smart he'll put [the purse] in [the] garbage."[19]

Wallace was then taken to police headquarters where he was again interviewed by New Orleans police, this time by Detective John C. Miller.[20] The written statement, which was not disclosed by the State until the state court post-conviction proceedings, indicates that the interview began at 12:55 a.m., Sunday, September 23, 1984. The statement repeats the essentials given earlier, but one portion, which concerns Wallace's version of events on Friday night, merits full quotation:

> Curtis had called his brother-in-law, Claude Burn[e]s, they call him John. I took a ride with Claude over to Curtis' house on Desire Street. We went inside and Calude [sic] went in the back of the house to talk to Curtis' old lady[,] Pinky [Burnes, Johnny Burnes' sister]. Then he came and we took another ride to Mazant St. That's where Curtis was with the car.... [Curtis] was standing next to the car, [and] he asked me if I wanted to buy it and he gave me the keys. See, I was supposed to buy his car, but he said that he wanted to sell me the [red] ford because he was going to give it to his old lady, but he got mad at her and wanted to sell it. I was going to give him the four hundred dollars for his car but I like the ford better so he sold me that one. He asked me to help him unload the ford, because he had grocery's in the Schwegmann bags in the trunk and on the back seat. We took the spare tire out and the jack and put it in his car. After we took everything out he took a brown purse out of the ford, from the front seat. He said that it was his old lady's purse. Then I got in the ford and I drove over back to his house on Desire St. [H]e rode with some friends of his to his house and we met on Desire by his house. That's when I helped him unload his car and bring the grocery's inside his house.... After that I just left. [sic passim].

Wallace then reiterated his claim that approximately three hours later, at 9:30 p.m. on the same Friday night, Curtis "called his brother-in-law" at the residence "where I stay and I went for the ride. We went to Curtis' house and picked him up and went back to Schwegmann ... [to] pick up his car, because he said that it didn'[t] want to start.... It was in the Schwegmann's parking lot ... [where] he picked up a pocket book he had by the building. [I]t was a big brown pocket book."

In a third pre-trial interview—between the State's chief trial prosecutor, Cliff Strider, and Wallace—Wallace's version of the events of Friday, September 22, 1984, had changed again.[21] Like the other two statements, this

a single brown leather woman's handbag, which was identified as belonging to Mrs. Dye.

19. On the tape itself, Sergeant Eaton actually makes the statement—quoting Beanie Wallace—in response to a question from Detective Miller. Wallace's actual statement is inaudible due to intense static. Eaton's quoting Wallace, however, is apparent from the tape. Moreover, at the state court post-conviction evidentiary hearing, Eaton testified as follows in response to questions from Kyles' state habeas counsel:

> Q. Do you have any recollection now as to why you [said] you had reason to believe the victim's [personal effects] would be in the trash?
> A. I sure do.
>
> Q. What it that?
> A. ... The subject Detective Miller had interviewed [i.e., Wallace, assuming the alias "Joseph Banks"] see[n] Curtis Kyles with a purse. I had asked him [about] the disposition of the purse, what [did] Curtis do with the purse.... He says, "He probably threw it away." ... He suggested that probably he'd throw it in his garbage....
> Q. When you say "he," you mean Beanie?
> A. Beanie had suggested that Curtis probably would throw it away in his garbage. I made the statement, to my knowledge, which is transcribed, telling Detective Miller when he asked me what he did say—Detective Miller had removed himself from the car and was searching the area. He [Miller] asked me what did he [Beanie] say, and I said "He said he'd probably throw it in the garbage...."

20. Detective John C. Miller and Detective Ray Miller are apparently different persons.

21. The precise date of this interview is unknown, but apparently it occurred around the time of the two trials in late 1984. It is undisputed that the interview in fact happened. At the state court post-conviction hearing, Kyles' counsel offered into the record the five pages of notes, which were discovered in the New Orleans District Attorney's file and which were identified as having been written by the State's chief trial prosecutor, Cliff Strider.

one was not disclosed to the defense until Kyles' conviction and death sentence had become final. Rather than allegedly picking up Curtis Kyles' car from the Schwegmann Bros.'s parking lot on Friday, Wallace claimed that he, Curtis, Johnny Burnes, and another man (identified as "Black")[22] drove to the supermarket parking lot on *Thursday*, in the early evening.[23] That is, in the third interview, Wallace claimed that they retrieved Kyles' car during the early evening of the same day Mrs. Dye was murdered. Strider's notes then recount that at approximately 7:45 p.m.,[24] the group drove to "Black's house" where Kyles, Black, and Johnny Burnes supposedly left Wallace in the car and proceeded to go inside. Approximately ten minutes later, according to Wallace, the others returned carrying groceries and a brown purse. The group then returned to Pinky Burnes' apartment, where the groceries were unloaded once again. After a night of drinking and smoking marijuana, the group allegedly broke up around midnight.

The next portion of Strider's notes are subtitled "Friday" and begin at "11:00," presumably 11:00 a.m. from the context of the notes. It is then, according to this version of Wallace's statement, that Curtis allegedly sold the red Ford to Wallace. The notes state that Wallace spent the remainder of the day and most of the night driving around New Orleans. Wallace returned to the home at which he was staying at approximately 4:00 a.m. Saturday morning.

The next portion of the notes are subtitled "Saturday" and begin at 10:00 a.m. Wallace recounted that he changed the license plates on the car that morning. By that afternoon, Strider's notes state, "B[eanie] put everything together." He then "called Miss Williams," who was apparently a contact at the New Orleans Police Department. By approximately 9:00 p.m., Wallace met with Detective Ray Miller and Sergeant Eaton—which comports with the contents of the undisclosed tape (discussed *supra*). Strider's notes then refer to the second police interview that ended early Sunday morning, at approximately 2:30 a.m. (discussed *supra*).

The next portion of Strider's notes are subtitled "Sunday" and begin at noon (12:00 p.m.), when the notes refer to a call from "Miss Williams" to Wallace. Williams "asked about gun—B[eanie] said he will find out—B[eanie] will call back." The notes then state that Wallace went to Pinky Burnes' apartment from approximately 2:00–5:00 p.m. After leaving for approximately two hours, Wallace returned for a "Sunday dinner" at Pinky Burnes' apartment; a number of other persons attended the dinner, including Curtis Kyles and Kevin Black.[25] At approximately 9:30 p.m. on Sunday night, Wallace departed and met with Detective Miller at approximately 10:00 p.m. The two drove around "trying to pass time till [the] garbage [was] put out" at Pinky Burnes' apartment; they "circled road till about 3:00 a.m." As will be discussed in greater detail below, the New Orleans police picked up the garbage before dawn.

Included in the state habeas record are New Orleans Police Department memoranda concerning the seizure of the garbage in

22. At trial, one of the defense witnesses was named Kevin Black, who, the prosecution argued, assisted Kyles, Wallace, and Johnny Burnes in retrieving Kyles' car from Schwegmann Bros.

23. Strider's notes indicate that the group drove to Schwegmann Bros. between 5:00 and 7:30 p.m.

24. Strider's notes do not specify a.m. or p.m., but presumably refer to 7:45 p.m., as is apparent not only from the context of the notes but also from a reference to the term "dark" written next to "7:30–7:45." Furthermore, Mrs. Dye was not murdered until 2:20 *p.m.* on Thursday.

25. Curiously, the State has consistently disputed whether in fact such a "dinner party" took place. However, Strider's handwritten notes support Kyles' claims about the dinner party. Strider's notes state that Wallace recounted that on Sunday, September 23, 1984, Wallace "[w]ent to Pinky's about 7 [o'clock]." The statement recounts that Wallace and various other people, including Kyles and Pinky Burnes, ate dinner. "[A]bout 9:00" Beanie left. I observe that at trial, police Detective John Dillman, who was in charge of the New Orleans Police Department's investigation of the Dye murder, testified under oath that he knew nothing of the defense's claim that Beanie Wallace came to Pinky Burnes' apartment for a Sunday dinner. Assistant DA Strider, who was present during that testimony, said nothing in response to Dillman's answer.

front of Pinky Burnes' apartment in the early morning hours on Monday, September 24, 1984. These documents were not disclosed to the defense until the state court post-conviction proceedings. One of those memoranda, from Sergeant James Eaton to Sergeant Dave Morales, states that "[w]e have reason to believe that the victims [sic] personal papers and the Schwegmann's bags will be in the trash." As discussed *supra*, during the original conversation between Wallace and the police, Wallace informed Sergeant Eaton that, "if [Curtis] is smart, he'll put [Mrs. Dye's purse] in the garbage." At the state habeas evidentiary hearing, Sergeant Eaton admitted that the phrase "we have reason to believe" used in the memo specifically referred to Beanie Wallace's "tip" about the garbage. After police seized the garbage, a brown handbag containing various personal effects of Mrs. Dye was discovered in the rubbish, along with numerous Schwegmann Bros.'s bags.

Curtis Lee Kyles was arrested outside Pinky Burnes' apartment late Monday morning. Police proceeded to execute a search warrant of the residence. They recovered a .32 caliber revolver, which was later determined to be the murder weapon, hidden behind the stove in the kitchen. Police also recovered various types of ammunition, including sixteen .32 caliber shells that were of the same brand as the shells in the pistol. Also recovered was what appeared to be a home-made holster for a pistol in the wardrobe in the bedroom.[26] Under the sink, the police discovered eight Schwegmann Bros.'s brown paper bags. In a kitchen cabinet, police also seized cans of three popular brands of dog and cat food similar to the brands normally purchased by Mrs. Dye (according to the trial testimony of Mrs. Dye's husband). Mrs. Dye's fingerprints were not found on any of the cans of pet food. Kyles' prints were not found on the .32 caliber revolver, the brown handbag, or in or on Mrs. Dye's red Ford LTD. However, Kyles' prints were found on a Schwegmann Bros.'s small receipt found in the red Ford LTD, although in the process of lifting the fingerprints, chemicals used by the police destroyed the face of the receipt.[27] A second Schwegmann Bros.'s receipt was also found in the trunk of Mrs. Dye's car, although Kyles' fingerprints were not found on that receipt.

B. The trials

In late November of 1984, Curtis Lee Kyles was put on trial for the capital murder of Dolores Dye. Kyles professed his innocence and supplied an alibi—claiming that he was picking up his children from school—and offered supporting witnesses. The entire theory of the defense was that Joseph "Beanie" Wallace had framed Kyles by planting evidence in Pinky Burnes' apartment and garbage. Wallace's alleged motive was three-fold: first, that Wallace, who admittedly had been seen in possession of the victim's car, wished to shift the blame to Kyles; second, that Wallace had romantic aspirations regarding Kyles' common-law wife, "Pinky" Burnes; and, third, that Wallace wished for reward money. The heart of the State's case was positive eyewitness testimony from four persons who were at the scene of the crime, although the State also relied on a number of pieces of circumstantial evidence.[28] Notably, Joseph "Beanie" Wallace did not testify as a witness for either the defense or the prosecution. After four hours of deliberation, Kyles' jury became deadlocked on the question of guilt, and a mistrial was declared.

In early December, a second trial occurred. Again, the heart of the State's case was the unshaken testimony of four eyewitnesses who positively identified Kyles in front of the jury. Again, the theory of the defense was that the eyewitnesses were mistaken in their identification of Kyles. Further, as the Louisiana Supreme Court recounted in its opinion on direct appeal:

26. This wardrobe possibly was the "chifforobe" to which Wallace referred in his September 22 statement.

27. The police failed to record the contents of the printed matter on the receipt.

28. Police further testified that three of those eyewitnesses had also picked Kyles out of a pre-trial photo line-up.

> The defense presented several witnesses who saw Wallace in a red car similar to the victim's about an hour after the killing. Other witnesses testified that Wallace had attempted to sell the car shortly after the murder. One witness observed Wallace stooping down near the stove in defendant's home the day before the gun was found behind the stove by the police. There was further testimony that Wallace and defendant resembled each other. Additionally, the defense presented testimony that Wallace was very romantically interested in Martina "Pink[ie]" Burns, defendant's [common-law wife] and the mother of defendant's [five] children.
>
> Finally, defendant took the stand and testified without contradiction that he had no prior convictions. Denying any involvement in the shooting, he explained his fingerprints on the cash register receipt [found in Mrs. Dye's car] by asserting that Wallace had picked him up in a red car [on Friday, September 21, 1984] and had taken him to Schwegmann's, where he purchased transmission fluid for his car and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the package of cigarettes. . . .[29] [T]here was also testimony that defendant's family kept a dog and cat and often fed stray animals in the neighborhood.
>
> On rebuttal, the prosecutor had Wallace brought into the courtroom. Each of the eyewitnesses, after viewing Wallace standing next to defendant, reaffirmed previous identifications of defendant as the murderer.[30]
>
> *Kyles*, 513 So.2d at 266–67.

C. Evidence that has subsequently come to light

During the state court post-conviction evidentiary hearing, Kyles' able habeas counsel, who replaced the defense attorney who had handled the trial and direct appeal, offered a number of items of new evidence that were discovered in the files of the New Orleans police and District Attorney's Office. It is undisputed that this evidence was not made available to the defense at the time of trial. Such evidence may be summarized as follows:

i) Six contemporaneous eyewitness statements taken by police following the murder (discussed *supra*);

ii) A tape recording of the lengthy conversation between Wallace and New Orleans police officers that occurred late in the evening on Saturday, September 22, 1984 (discussed *supra*);

iii) A typed and signed statement given by Wallace to another New Orleans police detective early in the morning of Sunday, September 23, 1984 (discussed *supra*);

iv) Hand-written notes of an interview of Joseph "Beanie" Wallace conducted by Cliff Strider, the chief trial prosecutor (discussed *supra*); and

v) A computer print-out of license plate numbers on cars parked in the Schwegmann Bros.'s parking lot recorded by New Orleans police at approximately 9:15 p.m. on September 20, 1984, the night of the murder.[31]

29. I have been unable to locate the receipt in the record, although the statement of the facts indicates that it was admitted as a State's exhibit at trial. I observe that, at trial, the judge repeatedly referred to the receipt as "a small piece of paper." Furthermore, at oral argument, Kyles' habeas counsel represented to the court—without contradiction by the State—that the receipt was approximately 2" × 2".

30. The state court neglected to mention that the prosecution also offered a blown-up photograph taken at the crime scene soon after the murder. Prosecutors argued that a medium to dark colored automobile in the background of the photograph was Kyles' own car. Prosecutors repeatedly argued during cross-examination of defense witnesses that Kyles had left his own car at Schwegmann Bros. on the day of the murder and had retrieved it later. The prosecution offered no evidence or witnesses to support this argument besides the blown-up photograph.

31. Another item of somewhat less significance was revealed at the state court post-conviction evidentiary hearing—a copy of an internal New Orleans police memorandum dated "9-20-84" (i.e., Thursday, the same day as the murder). The memo states that a New Orleans citizen who had apparently heard about the murder reported that, at approximately 7:00 p.m., a "bright red 1980–1983 Thunderbird" in the French Quarter drove into a parking meter and then swerved away. (Mrs. Dye's car was a bright red 1980

In support of Kyles' *Brady* claim,[32] Kyles' state habeas counsel offered a copy of the lengthy pre-trial motion filed by Kyles' trial counsel, who requested that the State disclose any exculpatory or impeachment evidence. Witness statements were among Kyles' requests. In its response to that motion, the prosecution based its denial on the claim that there was "[n]o exculpatory evidence."

II.

On appeal from the district court's denial of the writ of habeas corpus, Kyles raises two main claims: the aforementioned *Brady* claim and a somewhat related ineffective-assistance-of-counsel claim. I will address these two issues in turn. However, because the critical issue of "materiality" in this court's *Brady* analysis is governed by a standard identical to that governing the "prejudice" prong of the two-prong ineffectiveness analysis required by *Strickland v. Washington*,[33] I will address the *Brady* "materiality" and *Strickland* "prejudice" issues together after separately analyzing the first prongs of the *Strickland* and *Brady* standards.[34]

A. *Strickland*'s first prong: Was trial counsel deficient?

Under *Strickland v. Washington*, in order to prevail in raising a claim of ineffective assistance of counsel, a criminal defendant must make two separate showings: first, that counsel was "deficient," that is, that counsel did not provide "reasonably effective assistance"; and, second, that trial counsel's deficient performance "prejudiced" the defendant. *See id.* 466 U.S. at 687–98, 104 S.Ct. at 2064–70. As noted, I will limit my discussion here to the first prong of *Strickland*.

Of all of Kyles' specific allegations of ineffective assistance on the part of his solo trial counsel, Martin Regan, I believe that counsel was deficient in only one way, albeit a particularly important way: Regan not only failed to call Joseph "Beanie" Wallace as a defense witness, but even failed to interview him. At the state court post-conviction evidentiary hearing, Regan repeatedly testified that the only reason he failed to call "Beanie" Wallace to the stand at trial or even interview him was because Regan mistakenly believed that, under Louisiana evidence law, he would have had to vouch for Wallace's credibility—and thus could not impeach Wallace or ask him leading questions—unless Regan could show *both* surprise *and* hostility on Wallace's part. With respect to this claim, the state trial judge found that:

> Much has been made of Mr. Regan's opinion that he failed miserably in his defense of Mr. Kyles when he chose not to call Joseph Wallace as a witness. Mr. Regan stated that he incorrectly viewed the law as saying that if Joseph Wallace was called as a [defense] witness he would have had to vouch for his credibility unless he could have shown hostility and surprise on the

Ford LTD, which strongly resembles a Thunderbird; indeed, as discussed *infra*, at least one of the eyewitnesses to the murder originally described Mrs. Dye's car as a Thunderbird.) The citizen described the driver as "a negro male, 25 years of age, 5'10"-5'11" with short hair." The driver stopped and asked the citizen if he wanted a ride, which was declined. The citizen observed a "small bluesteel [i.e., dark metal, as opposed to nickel] revolver on the seat." Notably, in his various statements to police, Beanie Wallace admitted driving Mrs. Dye's car around New Orleans, including the French Quarter, although he claimed on Friday rather than on Thursday night. Wallace also stated that at one point that weekend he "pulled out and hit [a] fence—scratched on the passenger side." As discussed *infra*, Wallace's chronology of events between Thursday and Sunday significantly changed in each of his various statements given to police.

32. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

33. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

34. *Compare United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."), *with Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

> part of Mr. Wallace at the time that Mr. Wallace testified. *This was the law of Louisiana at the time of both Mr. Kyles' trials.* ... The law of Louisiana has subsequently been amended ... *But at the time of Mr. Kyles' trial, under existing law, Defense counsel certainly made an intelligent and strategically correct decision not placing Mr. Wallace on the stand as a defense witness.* (emphasis added).

The federal district court agreed that Regan's failure to call Wallace was a reasonable strategic decision in view of Louisiana law as it then existed.[35] I reject the conclusions of both the state trial court and federal district court. As I discuss below, I accept instead the conclusion of the Louisiana Supreme Court.

At the time of trial, the plain language of the applicable state evidence rule was as follows: "No one can impeach his own witness, unless he has been taken by surprise by the testimony of such witness *or* unless the witness shows hostility toward him, and even then, the impeachment must be limited to evidence of prior contradictory statements." LOUISIANA REVISED STATUTES 15:487 (emphasis added). Thus, as a matter of state law, the state trial court was mistaken. With respect to the federal district court's additional conclusion that Regan made a "strategic" choice not to put Beanie Wallace on the stand on the ground that he likely would not prove to be "hostile," I would reject this finding as clearly erroneous.

My basis for rejecting the federal district court's finding is the opinion of the Louisiana Supreme Court in *State v. Kyles*, 513 So.2d at 273: "Wallace was clearly a witness hostile to the defendant, and defense counsel was entitled to employ leading questions and to impeach the witness through any prior inconsistent statements.... Defendant's argument that he would have been required to show both hostility *and* surprise is clearly wrong."[36] In reliance on the opinion of the highest expositor of state law in Louisiana, I believe that Regan was deficient in failing to call Wallace to the stand because of a "clear" misunderstanding of a single, basic rule of evidence. Regan's *entire* strategy at trial was to argue that Wallace framed Kyles; his failure to call Wallace, who was present at trial and available to testify, was anything but "strategic."

The majority, agreeing in part with the district court, holds that Kyles' trial counsel made a "strategic" choice not to call Wallace to testify (or even interview him) because Wallace was a potential "loose cannon" whose testimony would have been a "double-edged sword" because Wallace "would almost certainly would have inculpated Kyles." Majority Opinion at 818–19. Thus, the majority reasons, trial counsel was not deficient under *Strickland*. I can only response by agreeing with the majority that I have no doubt that Wallace would have attempted to inculpate Kyles. But that is of no moment. The entire purpose of calling Wallace would have been to expose his leading role in the development of the prosecution's case, to impeach him and, in the process, to accuse him of framing Kyles and suggesting that Wallace had some role in the murder. One would hardly expect Wallace not to have attempted to inculpate Kyles. The majority simply misses the point.

35. The district court disagreed with the state trial court's conclusion that *both* hostility and surprise were required. However, the district court questioned whether Wallace would have been a "hostile" witness under Louisiana law. The district court based this conclusion on the testimony of Cliff Strider, the chief trial prosecutor, who testified at the state court post-conviction evidentiary hearing that "I told him [Regan] that I didn't think Beanie would get hostile. I didn't think Beanie would be upset." Thus, the district court held, "this court believes that Regan made a tactical decision that was reasonable and well advised at the time that he decided not to place Beanie on the stand."

36. In making these observations, the state high court was not addressing a claim of ineffective assistance of counsel. Rather, on direct appeal, Regan (who remained Kyles' counsel until his conviction was affirmed) raised an unrelated claim in which he coincidentally displayed his misunderstanding of Louisiana evidence law on the issue of hostile witnesses called by a party. The Louisiana Supreme Court, in rejecting that claim, noted Regan's "clear" misunderstanding of the law. The Louisiana Supreme Court's conclusion applies just as forcefully to the ineffectiveness claim.

B. The *Brady* claim: Suppression and Favorableness?

A *Brady* violation occurs where: (1) the government suppressed evidence; (2) the evidence was "favorable" to the defendant; and (3) the evidence was "material" to issues at trial. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *Bagley, supra; United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Brady, supra*. Favorable evidence includes both exculpatory and impeachment material. *Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380. The *Brady* doctrine applies equally to situations where a specific request, general request, or no request is made by the defense for particular favorable information. *Id.* at 682, 105 S.Ct. at 3383; *see also Kirkpatrick v. Whitley*, 992 F.2d 491 (5th Cir.1993). Furthermore, the *Brady* materiality standard applies equally to undisclosed evidence relating to the guilt/innocence and punishment stages of trial, *see Brady*, 373 U.S. 83, 83 S.Ct. 1194, including in capital cases, *James v. Whitley*, 926 F.2d 1433, 1437 (5th Cir. 1991).

After an evidentiary hearing at which the defense offered all of the above-mentioned items of evidence that were not disclosed at trial, the state trial court, in its findings of fact and conclusions of law, rejected Kyles' *Brady* claim:

> The Court finds no merit to [sic] any of the Defense allegations ... regarding violations of Brady versus Maryland.... Assuming, arguendo, that certain background information concerning and statements of Joseph Wallace were withheld by the State[,] this Court finds that this [was] not ultimately prejudicial to the Defense. The Court concludes that none of the evidence would have ultimately assisted the Defense to any significant degree in this case. It is important to note that Joseph Wallace was never called as a witness by the State. As such, there never could be an attempt by the defense to attack the character and credibility of Mr. Wallace. Hence, the State never sought to vouch for the credibility of Mr. Wallace. As such, there would be no basis for the attempted impeachment of Mr. Wallace by the Defense. It should be further noted that the Defendant was given ample opportunity, and successfully placed before the jury through credible evidence, the basic premise of the Defense's case, that Joseph Wallace was in fact the killer of Mrs. Dye and that Joseph Wallace "framed" the defendant for [sic] this killing. The Defense even went so far as to present evidence of possible bias and motive[,] i.e., Wallace's desire to gain the affection of Curtis' Kyles' female acquaintance—by having Kyles convicted of this crime and thereafter incarcerated. The jury was more than adequately exposed to the possibility that Joseph Wallace was in fact the killer. They were aware that he was in fact in possession of the victim's car shortly after her murder. The jury was likewise given the opportunity to see Mr. Wallace in person as he was brought into open court at the behest of the State. He was made to literally stand before the jury. At the same time the jury was afforded the opportunity to compare his height, his size, his physical characteristics to those of the defendant.... This Court finds that the new evidence ..., even if presented to another jury, would not in any way lead to a different outcome of this case.[37]

The federal district court likewise rejected Kyles' *Brady* claim. The court held that none of the alleged *Brady* evidence even met the second prong of the *Brady* test—that is, that such evidence be "favorable" to the defense on the issues of guilt or punishment. The September 22, 1984 tape-recorded conversation between Wallace and New Orleans police, according to the district court, "does not exculpate Kyles." The court also stated that Kyles' characterization of the contents of the tape "is not a fair rendition of the material contained in the tape itself."[38]

With respect to the police's computer print-out of the license numbers in Schwegmann's parking lot on the night of the murder, the district court held that because a New Orleans police officer had testified at the state court evidentiary hearing that the list was incomplete, the list "would have carried little if any exculpatory weight and bears so little on materiality that it fails to fit the *Brady* mold." With respect to the police memoranda regarding the garbage collection, the court stated that even if Beanie were the source of the tip about the garbage, "the bags that were picked up were identical, which renders improbable, if not impossible, the defense's argument that Beanie planted a bag of garbage." Regarding Smallwood's inconsistent witness statement, the district court conceded that Smallwood's trial testimony appeared "embellished," but summarily held that there was no "prejudicial error."

After stating that "[a] complete reading of the record convinces this court of Kyles' guilt and that he received a fair trial," the district court rejected Kyles' *Brady* arguments.

On appeal, Kyles once again advances his *Brady* claim. Kyles points to: i) Beanie's various undisclosed contradictory statements; ii) Isaac Smallwood's contemporaneous witness statement that conflicted with his trial testimony; iii) the computer print-out of license plate numbers; and iv) the police internal memoranda regarding the seizure of garbage.

As an initial matter, I address the contention that has been made by the state trial court judge and the State pertaining to the fact that the trial prosecutors—as opposed to the New Orleans police—may not have been aware of some of this evidence at the time of trial. If this were indeed true,[39] it would

37. The state trial court failed to address many particulars of Kyles' multi-faceted *Brady* claim, which were raised either in Kyles' state habeas petition or at the extensive state post-conviction evidentiary hearing. *See infra*. The Louisiana Supreme Court, by a vote of five to two, affirmed the trial court's denial of habeas relief.

38. In reaching this conclusion, the court noted, "Kyles alleges that had he had the tape recording he would have learned that:

> 1) Beanie knew in what area of Schwegmann's parking lot the murder was committed;
> 2) Beanie had said that Kyles wore a 'bush' hairstyle in contrast to testimony that the killer had 'plaits';
> 3) Beanie asked for $400 for the purchase price of the victim's car and was assured by police that he would be paid;
> 4) Beanie suggested to police that Kyles might put incriminating evidence in his garbage; and
> 5) Beanie feared apprehension because he had been seen driving the Dye automobile."

I reject the district court's conclusion that Kyles' "characterization" of the contents of the tape "is not a fair rendition of the material contained in the tape itself." I have repeatedly listened to the tape, have compared it to the transcript of the recording offered by Kyles' counsel, and agree with Kyles' characterization regarding each of the above five points. The characterization of whether certain undisclosed evidence is "favorable" to the defense (a prerequisite to a finding of "materiality" under *Brady*) is a mixed question of fact and law, which is reviewed de novo on appeal, rather than a pure factual finding. *See United States v. Rogers*, 960 F.2d 1501, 1510 (10th Cir.1992) (citing cases); *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir.1991); *United States v. Rivalta*, 925 F.2d 596, 9 (2d Cir.1991). Thus, the district court's conclusion is owed no deference and is re- de novo on appeal. Even assuming that ct court's conclusion regarding Kyles' "characterization" of the contents of the tape recording were a "pure" finding of fact, I would reject that finding as clearly erroneous. Finally, I observe that the majority does not appear to dispute Kyles' characterization of the contents of the tape recording.

39. I find the State's claim that the various items in the police file were not even made available to the prosecution until long after trial to be highly implausible; indeed, the State's claim here suggests that the State is not being candid with the court. The State has claimed that the various statements of the eyewitnesses, the three statements of Beanie Wallace, and the police memoranda were not available—to the prosecution *or* defense—until long after trial because of "slow typing" by police typists. *See* State's Brief, at p. 29. The claim was repeated at oral argument. However, the very documents that supposedly were typed long after the fact entirely belie the State's claim. All of the contemporaneous eyewitness statements, which were typed, were *signed and dated* by the various eyewitnesses in the immediate wake of the murder. Likewise, Beanie Wallace's second statement, which was typed, was *signed and dated* by Wallace on September 23, 1984—three days after the murder. I simply cannot accept the proposition these various typed documents were back-dated and signed after trial. Furthermore, Beanie Wallace's third statement, which was memorialized in Assistant DA Strider's notes, obviously was available before trial. And, finally, the original tape-recorded statement, which was never reduced to a hard copy until it was disclosed to the defense during the post-conviction proceedings, clearly was available, as it was on tape. The State's claim that the tape was never listened to

nevertheless be irrelevant. The *Brady* doctrine is not limited to prosecutors; rather, it includes *all* members of the "prosecution team," which includes all law enforcement officers who have worked on the case and thereby contributed to the prosecutorial effort. *See Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir.1977) ("The petitioner ... alleg[s] that Nicholson was a state law enforcement officer. As such, he was a member of the prosecution team."); *see also United States v. Buchanan*, 891 F.2d 1436, 1442–43 (10th Cir.1989) (citing cases); *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir.1989) (citing cases); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir.1985). In a similar vein, the good faith or bad faith of the prosecution has no bearing on the due process required by *Brady*. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196. Accordingly, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972).

That said, I agree with Kyles that all of these items of undisclosed evidence, particularly when considered cumulatively, would have been "favorable" to the defense at trial within the meaning of *Brady*. The state trial court, whose opinion was affirmed by the Louisiana Supreme Court, and the federal district court concluded that the evidence was not favorable because of the supposedly overwhelming evidence of Kyles' guilt. I disagree. Much of the *Brady* evidence in this case substantially detracts from the State's evidence and theories at trial. The undisclosed evidence, as Kyles correctly argues, "fits hand in glove" with his theory of the defense advanced at trial. Moreover, two of the undisclosed items—contemporaneous witness statements by Isaac Smallwood and Henry Williams—go to the reliability of the critical eyewitness testimony at trial. Rather than further addressing here how each item of undisclosed evidence would have been "favorable," I necessarily will address that question in Part II.C., *infra*, in discussing the larger issue of materiality.[40]

C. *Brady* "Materiality" and *Strickland* "Prejudice"

i) Why the two claims must be evaluated in conjunction

Having determined both that Kyles' trial counsel was deficient by failing to call Beanie Wallace as a defense witness and that a considerable amount of evidence was both suppressed by the State and favorable to the defense, I next jointly determine: i) whether the evidence was "material" under *Bagley*; and ii) whether trial counsel's deficiency "prejudiced" Kyles under *Strickland*. I believe that the only appropriate way to analyze Kyles' case is to consider his ineffectiveness and *Brady* claims in conjunction. After all, the "materiality" prong of his *Brady* claim in a significant way directly relates to the "prejudice" prong of his ineffectiveness claim, and vice versa. Furthermore, as noted *supra*, the inquiry for both claims is identical: assuming, counter-factually, that Wallace had in fact been called as a defense witness and that trial counsel had been privy to all of the aforementioned *Brady* evidence, it must be asked whether there is a "reasonable probability" that the result of the guilt/innocence phase or punishment phase would have been different. A "reasonable probability" is one that "undermines confidence in the outcome." *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383; *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.[41] The majority

by the prosecution, while irrelevant, is likewise implausible.

40. The majority opinion, unlike the district court and states courts, agrees that at least Beanie Wallace's tip to police about the garbage, discussed *infra*, was favorable. However, the majority holds that the totality of the *Brady* evidence, including Wallace's garbage tip, was not "material." As I discuss *infra*, I disagree with the majority on the question of *Brady* materiality.

41. I note here that the majority opinion repeatedly speaks of applying the "harmless error" rule to Kyles' *Brady* claims. The majority seems unaware that *Brady*'s progeny, in particular *Bagley*, have their own built-in test of "materiality" to determine whether any *Brady* violation was "harmful" to the defendant—namely, whether the undisclosed evidence undermines confidence in the verdict. I thus see no need to respond to the majority's rather curious claim that any *Brady* violation was harmless under *Brecht v. Abra-*

believes that there is no need even to engage in this joint *Bagley/Strickland* analysis because the majority holds that Kyles' trial counsel was not deficient for failing to call Wallace to the stand. *See* Majority Opinion at 815 n. 10.

ii) Why my confidence in Kyles' guilty verdict and death sentence is undermined

Under *Strickland* and *Bagley*, this court must determine whether there is a "reasonable probability" that, but for the two constitutional errors working in conjunction, Kyles' jury, considering all of the relevant evidence, would not have unanimously found either that there was sufficient evidence to prove beyond a reasonable doubt that Kyles was guilty or that Kyles should receive a death sentence.[42] The heart of the inquiry here is whether the constitutional infirmities rendered the proceeding *unreliable*. *See Lockhart v. Fretwell*, — U.S. —, — - —, 113 S.Ct. 838, 842–43, 122 L.Ed.2d 180 (1993).[43] Looking at the totality of evidence in this case—both that admitted at trial and that which should have been introduced—my confidence in the jury's guilty verdict and death sentence is undermined. *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383; *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

In this section, I focus on five main factors that undermine my confidence in Kyles' guilty verdict and death sentence. They may be summarized as follows:

(i) Kyles' first jury, hearing evidence essentially identical to that offered at the second trial, was deadlocked on the question of guilt;

(ii) Beanie Wallace's various statements not only reveal numerous material inconsistencies that suggest that the State's informant was not credible, but also are directly exculpatory in numerous ways;

(iii) the undisclosed contemporaneous witness statements not only undermine the eyewitness testimony at trial, but also contain information that suggests that Kyles was not the killer;

(iv) the remainder of the *Brady* evidence is significant; and

(v) the remainder of the State's case not only fails to support the prosecution's theory, but in fact bolsters the defense's theory.

My focus on these factors, particularly (ii)-(iv), chiefly concerns how a reasonably effective trial counsel would have used the *Brady* evidence had it been properly disclosed by the State. My analysis assumes that trial counsel would have utilized such evidence to support the theory of the defense at Kyles' actual trial: namely, that Curtis Lee Kyles had nothing to do with Mrs. Dye's murder and that the eyewitnesses were mistaken or being untruthful; that Beanie Wallace

hamson, — U.S. —, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

42. Under Louisiana law, a single holdout juror during the punishment phase would have automatically resulted in a life sentence for Kyles. *See State v. Loyd*, 459 So.2d 498, 503 (La.1984) (as long as a single juror held out and voted for a life sentence, automatic life sentence under Louisiana law); *see also* LA.CODE CRIM.PRO. 905.8. Although residual doubt is not a species of constitutionally relevant mitigating evidence, *see Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), there is no question that residual doubt plays a significant role in leading a jury to impose a life sentence, *see Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 1769, 90 L.Ed.2d 137 (1986) ("[A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical doubts' ... about the evidence so as to decide against the death penalty. *Such residual doubt has been recognized as an extremely effective argument against the death penalty.*") (citations and internal quotations omitted) (emphasis added). Kyles' trial counsel accordingly argued that Kyles' sentencing jury should consider their residual doubt in assessing punishment. In this regard, it is noteworthy that Kyles did not have any other aggravating factors supporting the imposition of a death verdict besides the fact that the murder for which he was convicted was committed in the course of a robbery. And, finally, I note that Kyles lacked a significant prior criminal history, which is important mitigating evidence. *See Kyles v. State*, 513 So.2d at 276. The majority incorrectly states that Kyles had no mitigating evidence "other than his close relationships with his family." Majority Opinion at 811–12.

43. Although *Lockhart* was an ineffectiveness case, its emphasis on reliability is equally applicable to *Brady* claims in view of *Bagley*'s wholesale adoption of *Strickland*'s "prejudice" requirement.

"framed" Kyles not only by falsely informing police that Kyles had sold Mrs. Dye's car to Beanie and that Kyles had retrieved his own car from the Schwegmann Bros.'s parking lot after the murder, but also by planting various pieces of incriminating evidence at Pinky Burnes' apartment; and, finally, that Wallace himself possibly had some role in the Dye murder.

As an initial matter, unlike the majority I assume here that, had Wallace been interviewed by Kyles' trial counsel, counsel would have called Wallace as a defense witness at trial and attempted to have Wallace explain his various statements given to the State before trial. This scenario assumes that Wallace would have agreed to testify and would not have invoked his Fifth Amendment right to avoid self-incrimination. The State has never suggested that Wallace would have done so, perhaps because there is a serious question about whether Wallace could have effectively made a "blanket" invocation of the Fifth. *See State v. Smith*, 573 So.2d 1233, 1236 (La.App.1991); *State v. Boyd*, 548 So.2d 1265, 1268–69 (La.App.1989).[44] Assuming that Wallace had invoked the Fifth in whole or in part, Wallace's invocation would have presented Kyles with valuable ammunition supporting the theory of the defense. Why, Kyles' trial counsel could have argued to the jury, did the State's informant invoke the Fifth in a case in which he was supposedly only a "good citizen"?

Furthermore, assuming that Wallace had invoked the Fifth in whole or in part, Kyles' trial counsel would nevertheless have been able to utilize the various *Brady* evidence regarding Wallace.[45] Much, if not all, of Wallace's various inconsistent statements would have likely been admissible in other ways. For instance, by calling the various New Orleans police who worked with Wallace (or possibly even prosecutor Cliff Strider) as hostile defense witnesses and questioning them about their meetings with Wallace and about the information available to them during the investigation—rather than whether such information was in fact true—a great deal of Wallace's statements could have been introduced as non-hearsay under Louisiana evidence law in operation at the time of Kyles' trial. Finally, simply by proffering Wallace's various inconsistencies—rather than arguing that any of them were in fact true—the defense could have offered the statements as non-hearsay under Louisiana evidence law. *See State v. Hennigan*, 404 So.2d 222, 228–29 (La.1981) ("[E]vidence is not hearsay when offered to prove only that it occurred ... or that a conversation took place.").[46]

I also observe that all of the *Brady* evidence would have directly supported the actual evidence and testimony presented by the defense at Kyles' trial—a theory of the defense that provoked a hung jury on its own without the *Brady* evidence. As I discuss below, information gleaned from Wallace's various statements—such as his admissions that he indeed possessed Mrs. Dye's car shortly after the murder, that he changed its license plates, and that he was actually present at the "Sunday dinner" at Pinky Burnes' apartment on the Sunday after the murder—would have bolstered the credibility of key defense witnesses.

a) The deadlocked jury at Kyles' first trial

The majority, echoing the district court, states that Kyles "faces overwhelming evi-

44. Although obviously Wallace could have invoked the Fifth regarding certain questions (e.g., how Wallace knew the location of the murder in the Schwegmann Bros.'s parking lot), other lines of defense questioning would have been proper and not potentially incriminating (e.g., asking Wallace to explain the various inconsistencies in his statements). I also observe that the trial judge would have had discretion to permit the defense to ask Wallace potentially incriminating questions in front of the jury. *See State v. Edwards*, 419 So.2d 881 (La.1982).

45. The remainder of the *Brady* evidence—such as the police memoranda—would have been admissible and highly relevant standing on its own, irrespective of whether Wallace had been called as a witness.

46. A competent trial counsel could have laid the proper evidentiary foundation for introducing Wallace's various statements by first questioning police officers such as Detective Dillman about the New Orleans Police Department's basis for suspecting that Kyles was the murderer and why the police believed that incriminating evidence would be inside Pinky Burnes' apartment and in her garbage.

dence of guilt," a conclusion which dictates the majority and district court's rejection of Kyles' ineffectiveness and *Brady* claims. That is, the majority reasons that Kyles could not have been prejudiced because the result of the proceeding would have been the same whether or not the constitutional errors occurred. If indeed that were true, then why did Kyles' first jury trial, which occurred immediately before the second trial and which involved essentially the same evidence and prosecution and defense theories, end in a mistrial because of a deadlock on the question of guilt? The theory of the defense—even without all of the critical evidence withheld and without Wallace's testimony—was obviously not as weak as has been claimed. *See Stano v. Dugger*, 901 F.2d 898, 903 (11th Cir.1990) (en banc) (in finding a *Brady* violation, the court pointed out that a deadlocked jury had caused mistrial at defendant's prior trial).

As the Supreme Court has repeatedly observed, appellate judges are presented with only a "cold record" from which to evaluate the proceedings that transpired below. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1039–40, 104 S.Ct. 2885, 2893, 81 L.Ed.2d 847 (1984). In most cases, we cannot accurately assess the credibility of witnesses and the plausibility of counsel's arguments based on the evidence merely from reading the statement of the facts. We are not aware of such important subtleties as a witnesses' demeanor or trial counsel's apparent sincerity (or lack thereof). In this regard, the fact that one or more jurors at Kyles' first trial were not convinced beyond a reasonable doubt of his guilt is significant in assessing the force of Kyles' case or, alternatively, the weaknesses in the State's case.

b) "Beanie" Wallace's various undisclosed statements

Of all of the *Brady* evidence, I consider Beanie Wallace's undisclosed statements to be the most significant. First, the statements reveal that the State's informant, who was crucial to the State's ability to finger Kyles in the first place, was an incessant liar and schemer who appeared anxious to see Curtis Lee Kyles arrested for the murder of Delores Dye. Second, the statements contain significant exculpatory evidence. I first note the significant contradictions in his various statements.

1) Contradictions

Wallace's September 22, 1984 (Saturday) oral statement[47] to New Orleans police consisted of the following chronology: on the prior Friday, at approximately 6:00 p.m., Kyles sold Mrs. Dye's red Ford to Wallace; at 9:00 p.m., Wallace, Kyles' brother-in-law, and Kyles drove to Schwegmann Bros.'s parking lot to retrieve Kyles' car; while at the supermarket, Kyles also retrieved a large brown woman's purse from nearby bushes. Wallace's September 23, 1984 (Sunday) written statement to police consisted of the following chronology: on the prior Friday, at approximately 6:00 p.m., Kyles sold the red Ford to Wallace at some location on Mazant Street in New Orleans; after the purchase, Wallace, Kyles, and Kyles' brother-in-law unloaded bags of Schwegmann Bros.'s groceries and a brown purse from the red Ford's trunk and back seat and placed them in Kyles' car; the three then drove to Pinky Burnes' apartment, where the groceries were unloaded; at approximately 9:00 p.m., Wallace, Kyles, and Kyles' brother-in-law drove to Schwegmann Bros. to retrieve Kyles' car; at Schwegmann Bros., Kyles also retrieved a "big brown pocketbook he had by the building."

In Wallace's final oral statement, memorialized in the handwritten notes of the chief trial prosecutor, Cliff Strider, Wallace recounted the following chronology: on Thursday, September 20, 1984, in the early evening, sometime after 5:00 p.m., Wallace, Kyles, Kyles' brother-in-law, and Kevin Black drove from Pinky Burnes' apartment in the brother-in-law's car to Schwegmann Bros., where they retrieved Kyles' car; the four thereafter returned to Pinky Burnes' apartment; at approximately 7:30–7:45 p.m., the four then drove to Black's residence,

47. It is noteworthy that in making this first statement Wallace assumed the alias "Joseph Banks" and was not forthcoming about his criminal record, namely a conviction of being an accessory to a murder, and instead claimed that he had been convicted only for "fighting."

where they retrieved bags of Schwegmann Bros.'s groceries and a brown purse; the four then returned to Pinky Burnes' apartment, where the Schwegmann Bros.'s bagged groceries and the brown purse were taken into the apartment; the next day, Friday, in the early afternoon, Kyles drove Wallace to Black's house where Wallace purchased Mrs. Dye's stolen red Ford; Wallace drove the red Ford around New Orleans with a friend, Ronald Gorman,[48] until early Saturday morning; on Saturday afternoon, Wallace changed the license plates on the car and then discovered that the car had been stolen from Mrs. Dye; thereafter, Wallace contacted police on Saturday night.

Unlike the majority, I believe that it is obvious that these three statements contain significant inconsistencies that would have been extremely valuable to the defense. In particular, the various inconsistencies would have permitted jurors to see that Wallace was an opportunist and liar. The changes in the dates and times of when he was sold the car, when the groceries were retrieved, and when Kyles' car was allegedly retrieved from the Schwegmann Bros.' parking lot—statements given within a day or two after the alleged events—would have painted a compelling picture of someone who was lying to police or at least one who knew much more than he was telling the police. A jury could reasonably conclude that Wallace was spinning an elaborate web of lies, thus discrediting a significant portion of the prosecution's theory of the case.[49]

The majority greatly discounts the significance of evidence of Wallace's scheming to have Kyles arrested for Mrs. Dye's murder. The majority argues that because the theory of the defense at trial was that Beanie framed Kyles, the "new" evidence would have only been "cumulative." *See* Majority Opinion at 814–15. The majority's reasoning here assumes that the jury would have had no more reason to believe the defense's theory if the various undisclosed evidence had been introduced. As the majority correctly observes, the first line of defense at both of Kyles' trials was that Beanie Wallace framed Kyles and possibly that Wallace was in fact somehow involved in the murder. That defense was supported by relatively weak evidence at trial—testimony of Kyles' friends and family. The undisclosed evidence, in particular Wallace's own words, would have greatly bolstered the theory of the defense. The *Brady* evidence in this case would have afforded the defense the opportunity to argue forcefully that Wallace framed Kyles and that perhaps Wallace himself had some role in the murder.[50]

48. Gorman was a defense witness at trial, who testified that Wallace, wearing his hair in braids, possessed the red Ford on the day of the murder and attempted to sell it to Gorman.

I further note that included in the habeas record is an undisclosed transcript of a conversation between New Orleans Police Detective Pascal Saladino, who worked on the Dye case, and Gorman. The transcript is dated November 28, 1984, which was in the interim between Kyles' first and second trial. Towards the end of the statement, Gorman told Saladino that Beanie Wallace had threatened to kill Gorman if he testified on behalf of Kyles (and, thus, against Wallace) at the second trial. The transcript was first introduced into the record at the state habeas evidentiary hearing.

49. Especially noteworthy is Wallace's claim in his September 23, 1984 statement to police that, at approximately 6:00 p.m. on Friday, September 21, Kyles, Kyles' brother-in-law, and Wallace moved the groceries from the stolen red Ford to *Kyles' own car*. Then, Wallace claimed, three hours later, Kyles requested that Wallace and Kyles' brother-in-law drive Kyles to Schwegmann Bros. in order to retrieve *Kyles' own car*. This asks one to believe that on the day after the murder Kyles returned to the murder scene and left his car that had not been parked there previously. Furthermore, these claims take on particular relevance in view of the State's attempt to prove at trial—using a blurry, blown-up police photograph—that Kyles' car was parked at the murder scene on Thursday afternoon immediately following the murder.

50. I note that at trial there was no direct evidence of just how Kyles became the New Orleans Police Department's leading suspect in the Dye murder. The State never called Wallace as a witness and no policemen were called to testify about Wallace's involvement in the investigation. Rather, it was apparently assumed in the respective theories of the prosecution and defense during the trial that Wallace had some role in the murder investigation. Thus, the jury likely was not aware of the significance of Wallace's role and could only infer that Wallace must have had some role in the police effort based on the defense claims that Wallace was in possession of Mrs. Dye's car.

2) Potentially exculpatory material

Wallace's statements are also significant in that they contain direct or indirect exculpatory material. There are numerous statements made in the September 21, 1984 (Saturday) tape-recorded conversation that are notable in this regard. First, Wallace twice made a significant admission: he changed the license plates on the stolen red Ford. As Kyles argues, this action casts into doubt the State's claim that Wallace was simply an unwitting *bona fide* purchaser of a stolen automobile.[51] It also would have corroborated trial testimony of Johnny Burnes, Wallace's self-styled "partner," who testified (under attack from the prosecution) that he witnessed Wallace changing the plates on a red car on the day of the murder.[52] Burnes also provided other testimony important to the theory of the defense, namely that on Sunday, September 23, 1984, Burnes witnessed Wallace stooping down at the stove in Pinky Burnes' apartment where police ultimately recovered the murder weapon.

Second, Wallace's "tips" to police that they "would be smart" to look in the garbage outside Pinky Burnes' residence and that they could "set up" Kyles and find the murder weapon inside the apartment suggest that Wallace was in control of critical evidence. A jury could rationally infer based on Wallace's apparent control over the evidence that he was somehow involved in the murder.[53] Also significant in this regard are Wallace's various confusing claims about how Mrs. Dye's purse was retrieved at the scene of the murder. In particular, Wallace made the odd claim that Kyles retrieved Mrs. Dye's purse from bushes next to the Schwegmann Bros.' parking lot. This simply makes no sense. Eyewitnesses to the murder testified that Mrs. Dye's brown purse was placed in the trunk before she was confronted by her attacker. No one testified that the assailant took her purse and placed it in nearby bushes before driving her car away. Even assuming that the purse did not somehow make its way into Mrs. Dye's car, which her assailant immediately drove away, this hardly explains how the purse could have ended up in nearby bushes. Wallace's bizarre claims about retrieving the purse from the

51. I observe that at trial Detective John Dillman, who headed the New Orleans Police Department's investigation into Mrs. Dyes' murder, was squarely asked by Kyles' trial counsel, "[a]re you aware that Beanie changed the license plate on this red vehicle belonging to Mrs. Dye?" Detective Dillman responded under oath that, "I have no knowledge of that, sir."

52. At trial, Johnny Burnes obviously attempted to boost his credibility by stating that he and Wallace were "best friends" at the time of Kyles' arrest; this claim would have been supported by Wallace's repeated references to Burnes as his "partner."

The majority states that the state trial court found that Johnny Burnes was not a credible witness. The majority holds that this finding is entitled to deference under 28 U.S.C. § 2254(d). *See* Majority Opinion at 815–16. The majority errs here, at least if it is holding that we are bound by a state court fact-finding that Johnny Burnes was not credible as-a-matter-of-law at trial, which the majority appears to hold. The state trial court found that Burnes was not credible *at a post-conviction hearing* where Burnes testified, not in Burnes' testimony at trial. I further note that the majority's apparent reliance on § 2254(d) regarding Burnes' credibility *at trial* is inappropriate here because Johnny Burnes' credibility at trial could have been significantly boosted by this evidence that the State failed to disclose. The finding by the state trial court thus cannot bind us regarding Burnes' *trial* testimony. Even if the majority's characterization of the state court's finding was correct—which it is not—a state habeas court's view of the weight of evidence or testimony actually offered at a jury trial could be "found" by a state trial judge to be, in effect, incredible as-a-matter-of-law. Such a credibility finding—a *factual* finding—wrongly enters into the province of the jury; that is, the credibility of a witness' trial testimony would be a quintessential question for a jury, not a trial judge.

53. In claiming that the undisclosed tape recording and various internal police memoranda regarding the garbage were not "material" under *Bagley*, the majority argues that even without the undisclosed evidence regarding the garbage tip, "Kyles made a credible case that Beanie could have planted this evidence. It was undisputed at trial that *anyone* could have had access to the garbage bags sitting on the curb and that Beanie was attempting to incriminate Kyles." Majority Opinion at 815. The majority makes the erroneous assumption that Wallace's mere opportunity to plant the incriminating items and concrete evidence that Wallace actually suggested to police that they should look into the garbage would have been equivalent in jurors' eyes. I simply cannot believe that a jury would not have given tremendous weight to Wallace's tip to police as highly probative evidence that he framed Kyles.

bushes suggest that he was lying in order to dispel suspicion from himself about having possession of the purse. A jury could reasonably infer that Wallace's unsolicited communication to the police, when combined with his statements about such key evidence, indicated that he indeed "framed" Curtis Lee Kyles.[54]

Wallace made another incriminating admission during the first recorded conversation: he evinced an apparent awareness of the specific part of the parking lot where Mrs. Dye was killed. Although a jury possibly could rationally conclude, as the State and the majority contend, that Wallace gleaned this particular information from the media, a jury also certainly could reasonably conclude otherwise. This is potentially critical information to the theory of the defense in view of the fact that Wallace consistently denied that Kyles, Kyles' brother-in-law, or any of Kyles' other compatriots told Wallace that Kyles had murdered Mrs. Dye.

Another bit of potentially valuable information that Wallace disclosed in the September 22 statement that bolsters the theory of the defense concerns his repeated statements that Kyles not only generally wore a "bush" hairstyle, but also wore one on the day that Wallace purchased the car. Although Wallace at one point claimed that he bought the car on *Friday*, in at least one statement he also claimed that he was in the presence of Kyles on *Thursday*, within three hours of the murder. When combined with the numerous eyewitness statements describing the murderer as wearing his hair in braids or plaited, a rational jury could find this statement significant.

Finally, Wallace's admission to Assistant DA Cliff Strider that Wallace was in fact present during the "Sunday dinner" at Pinky Burnes' apartment is evidence from which a jury could infer that Wallace had an opportunity to plant the various incriminating items. Furthermore, in this regard, Wallace's statement specifically comports with Johnny Burnes' trial testimony that he witnessed Wallace reaching down and placing something behind the stove that Sunday night.

c) The undisclosed eyewitness statements

As the district court correctly observed "the essence of the [S]tate's case ... was founded on the positive identification by four eye-witnesses who saw Curtis Lee Kyles at varying stages of the incident calmly placing a gun to the head of an unarmed woman, and blowing her brains out (for absolutely no other reason than to rob her), and then driving away in her car." Despite specific requests from the defense during pre-trial discovery, the State did not disclose the contemporaneous witness statements taken by New Orleans police from three of those four witnesses who testified at trial.[55]

54. I note that Detective Dillman explicitly testified at the state habeas evidentiary hearing that he was *not* given the tip that evidence might be found in the garbage outside Pinky Burnes' apartment from Wallace. Similarly, one of Sergeant Eaton's underlings, Officer Pascal Saladino, who actually seized the garbage, testified at trial that the police did not act on a tip in seizing the garbage. The State argues in its appellate brief that "[i]t is not clear that Beanie made this suggestion, but assuming he did, so what? In the context of the facts of this case, it is a suggestion that would not be unexpected and a conclusion that the police would be expected to reach." I observe that, at the state court post-conviction evidentiary hearing, Kyles' chief trial prosecutor testified that he did not remember a single instance before Mrs. Dye's murder where New Orleans police had searched and seized garbage on the street in front of a residence.

55. Those four witnesses were Robert Territo, Isaac Smallwood, Henry Williams, and Darlene Cahill. Contemporaneous statements were only taken from Territo, Smallwood, and Williams. Three other eyewitnesses—Lionel Plick, Edward Williams, and Willie Jones, none of whom ever positively identified Kyles—did not testify at trial. According to the testimony of Officer John Dillman, three of the eyewitnesses, Smallwood, Henry Williams, and Territo, were able to positively identify Kyles from a pre-trial photographic line-up conducted a few days after the murder. That line-up consisted of pictures—both a frontal view and profile—of six young black males from the waist up. Kyles was # 6 in the spread. Wallace was not a part of the spread. I observe that, in pictures with equivalent hair styles, Wallace and Kyles' facial features resemble each other. *See also Kyles v. State*, 513 So.2d at 268 ("There was ... testimony that Wallace and [Kyles] resembled each other."). Indeed, as Kyles points out, one of the eyewitnesses who identified Kyles out of the pre-trial photo-line up, Isaac Smallwood, positively identified Wallace rather than Kyles when presented with a post-trial photo line-up in which Kyles and Wallace had identical hair styles.

I also observe that the police officer who conducted the photo line-up and who testified about it at trial, John Dillman, made numerous statements under oath in the state court proceedings that cast serious doubt on his credibility. *See supra*. Such statements included testimony about the contemporaneous witness statements given by the eyewitnesses who testified at trial. As discussed *supra*, those witness statements were not turned over to the defense at trial, despite a specific request, because the State claimed that they contained nothing exculpatory. Dillman nonetheless testified about them at trial, without producing copies of them.

Kyles' trial counsel, on cross-examination of Dillman, asked him "[d]id these physical descriptions differ in any single point?" Dillman responded that "[p]ossibly the only discrepancy would have been in height.... *The discrepancy would have been anywhere from a description of five feet eight to a description of possibly six feet tall, which is a difference of three or four inches.*" (emphasis added). This response, of course, was simply untrue. Henry Williams' witness statement estimated that the killer was as short as 5'4", which would make the discrepancy *eight* inches. Similarly, when asked about age discrepancies, Dillman stated that the eyewitnesses all described the killer as being in his twenties when in fact three different eyewitnesses described the killer as ranging from seventeen to nineteen years old. As noted, Kyles was twenty-five at the time of the crime, and the photographs of Kyles in the record depict a man in his mid-twenties. Dillman also claimed that there was "no discrepancy in facial hair or features at all," when in fact Isaac Smallwood described the killer as having a moustache, a feature described by none of the other eyewitnesses, many of whom claimed to have seen the killer up-close. (In photos of Kyles both before and after the killing, he possesses a light moustache.) Finally, Dillman neglected to mention that Smallwood described the killer as having shoulder-length braided hair, while Henry Williams described the killer as having "short" hair.

Kyles points to Isaac Smallwood's statement, in which Smallwood described what he saw as follows: "I was standing near the old gas pumps, with my back facing the Chef Hwy. and facing old Gentilly Rd. *I heard a loud pop. When I looked around I saw a lady laying on the ground, and there was a red car coming toward me.*" (emphasis added). According to this statement, Smallwood's identification of the assailant came when he drove the car, which Smallwood described as a "red thunder bird," past him. When a police investigator specifically asked him, "[w]hen you first heard the shot, and looked at the lady on the ground, was the black male standing near her?," Smallwood responded "*[n]o. He was already in the car and coming toward me.*" (emphasis added).

Both at the pretrial suppression hearing and at trial, however, Smallwood gave a significantly different eyewitness account. He testified that he actually saw the black assailant, whom he positively identified as Kyles, struggling with Mrs. Dye. He further testified that he specifically saw Kyles raise the pistol—which Smallwood described as a "small black ... .32"—and shoot Mrs. Dye in the head.[56] Smallwood also described Mrs. Dye's car as a red "LTD." Thus, by the time of trial, Smallwood had not only changed his story by claiming that he actually witnessed the struggle and shooting, but also described it in vivid detail. He described the murder weapon as a small black .32 caliber pistol—which, of course, was the type of murder weapon used—and changed his description of the victim's car from a "thunderbird" to a "LTD."[57] Jurors were also not told that, shortly after the crime, Smallwood described the assailant has having shoulder-length hair and a moustache—descriptions given by none of the other eyewitnesses.

A second of the four eyewitnesses who testified at trial, Henry Williams, told police shortly after the murder that the assailant was "a black male, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 lbs., medium build, dark complexion, his hair looked like it was platted, it was short." I observe that

56. When asked to describe what he witnessed, Smallwood informed jurors that "[w]ell, me and my partner was standing by the gas pump in Schweggman's parking lot. My partner seen this guy wrestling with this lady. We thought they was just playing with one another, thought they knew one another. So the guy, he snatched her hand. When he snatched her hand, she wouldn't release the keys from her hand, so he just went up in his pocket and shot her in the head ... [with] like a small .32, a small black gun that he took out of his right pocket." *When specifically asked by prosecutor Strider, "[a]nd did you see him actually shoot her?," Smallwood stated "Yeah."*

57. Smallwood's correction of such minutiae between the time of making the contemporaneous witness statement and the time of trial raises serious questions in my mind. In particular, the

the record makes numerous references to Curtis Kyles as being approximately six feet tall and slender; photographs in the record confirm these descriptions. Conversely, Joseph "Beanie" Wallace was described as being shorter than Kyles, perhaps as much as by a half a foot. Photographs of Wallace also depict a man possessing a medium build.

Both of these witness statements, neither of which were disclosed despite a specific pre-trial request by the defense, would have been valuable to the defense at trial. A reasonable juror could not have reached any other conclusion except that Smallwood dramatically changed his story by the time of trial, thereby undermining the credibility of his identification.[58] Williams, too, would have had a difficult time explaining how he could have described a 6' skinny man as being 5'4" or 5'5" and possessing a "medium" build.

The district court and the majority make much ado about the fact that all four eyewitnesses who testified at the second trial positively identified Kyles as the killer after the State brought in Wallace and had him and Kyles stand side by side for comparison. I do not believe that fact to be nearly as significant as the majority does. First, the same witnesses had, on numerous occasions,[59] previously identified Kyles in court as the killer, in identifications in which Kyles sat at the defense table and was not compared to Wallace. Three of the four had also seen Kyles—but not Wallace—in photo spreads. Human nature as it is, the four had a psychological incentive, subconscious or otherwise, not to recant their positive identifications of Kyles.

Second, I believe that the in-court identifications by Williams and particularly Smallwood are of little probative value. While it is true that in-court identifications are generally considered significant prosecutorial evidence, *see generally Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), such evidence loses a great deal of its probative force when the defense establishes that a witness gave a significantly different account at the time of the original identification, *cf. Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) (noting that a key factor in deciding whether impermissibly suggestive line-up procedure followed by in-court identification caused harm to defendant is "the accuracy of the witness' prior description of the criminal"). Moreover, as the Supreme Court has observed, the effective impeachment of one eyewitness may have consequences that extend to another, unshaken eyewitness. *See United States v. Agurs*, 427 U.S. 97, 112–13 n. 21, 96 S.Ct. 2392, 2402 n. 21, 49 L.Ed.2d 342 (1976) (citing Comment, *Brady v. Maryland and The Prosecutor's Duty to Disclose*, 40 U.CHI. L.REV. 112, 125 (1972)). In Kyles' case, the remaining unimpeached eyewitness testimony would thus have been considerably less forceful had the two witness statements been disclosed.

Finally, it should also be generally noted that eyewitness testimony, contrary to popular belief, has repeatedly been proven notoriously unreliable. *See United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967); Loftus & Ketcham, *Witness for the Defense: The Accused, the Eyewitness, and the Expert Who Puts Memory on Trial* (1991); Sanders, *Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards*, 12 AMER. J.CRIM.L. 189 (1984). As the United States Supreme Court observed in *Wade*, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." 388 U.S. at 228, 87 S.Ct. at 1933.[60]

embellishment suggests that Smallwood was coached.

58. The majority concludes that because "Smallwood consistently stated that the gunman drove [Mrs. Dye's car] close by him [Smallwood]," Smallwood's identification of Kyles at trial was reliable. *See* Majority Opinion at 812–13. The majority here ignores the important fact that a jury would probably have disbelieved anything that Smallwood said after it was revealed that he had fundamentally changed his account of the murder by the time of trial.

59. At both trials, the witnesses identified Kyles both in pre-trial suppression hearings and during the prosecution's case-in-chief. The comparative identifications, in which Wallace was made to stand besides Kyles, occurred at the second trial during the prosecution's rebuttal.

d) The remaining *Brady* evidence

1) The computer print-out of license plate numbers

Another item of *Brady* evidence that was wrongly withheld, according to Kyles, was a New Orleans Police Department computer print-out and attached cover memorandum dated "9–20–84" from Detective Patrick Jones to Detective John Dillman. The memo states, "[a]ttached you will find a print out of vehicles which were parked in the parking lots around Schweggmans [sic] on 9–20–84 at 9:15 p.m.". Kyles argues that this print out, which was not disclosed to defense counsel at trial, would have been valuable exculpatory evidence because it tends to prove that Kyles' car was not in the parking lot on the night of the murder.

At trial, the State introduced a photograph made by police at the crime scene immediately following the murder. The blurry, blown-up photograph, according to the State, depicts a portion of the top of Curtis Kyles' car, which allegedly was still parked in the Schwegmann Bros.'s parking lot within an hour or two after the murder. As I discuss *infra*, the State's photographic evidence here is anything but conclusive. Had Beanie Wallace taken the stand at trial and repeated his claim made twice to police that he, Kyles, and Kyles' brother-in-law drove to Schwegmann Bros.'s parking lot on the evening of Friday, September 21, 1984, to retrieve Kyles' car, the computer print-out would have been valuable impeachment material, thus supporting the theory of the defense.[61]

The district court stated that the print-out "fails to fit the *Brady* mold" because at the state post-conviction evidentiary hearing "the defense learned that the list was not a com-

60. In a Rule 60(b) motion filed in the district court following the denial of the habeas writ, Kyles for the first time offered an affidavit from one of the eyewitnesses who testified at trial—Darlene Cahill (now Darlene Kersh)—in which she swears under oath that she perjured herself at Kyles' two trials. The affidavit claims that she never in fact saw the murderer's face and that her trial testimony, in which she unequivocally identified Kyles as the killer, was entirely false. She further claims that she informed the prosecution of her inability to identify Kyles, but that prosecutors asked her to commit perjury. The district court held that the claim based on Cahill's testimony was an abuse of the writ. The court further held that, even if it were not abused, "such evidence would not have affected the jury verdict in this case. [Kersh's] testimony was cumulative and in the context of the entire trial transcript, rather inconsequential.... Ms. Kersh's testimony was of little consequence in relation to the other eye-witnesses and the evidence found in Kyles' girlfriend's apartment."

In a prior appeal in this case, this court held that Kyles' claim was not appropriately raised for the first time in a Rule 60(b) motion and that further the claim had never been exhausted in the state courts. *See Kyles v. Whitley*, 980 F.2d 1445 (5th Cir.1992). We held that "a habeas petitioner may not use Rule 60(b) to raise constitutional claims that were not included in his original habeas petition." We further held that "[t]he district court should not, however, have said anymore" in its order denying relief.

I believe that this claim should be returned to state court so that all of Kyles' specific claims may be reevaluated in view of this extremely serious allegation of prosecutorial misconduct and perjury—which, if proven true, would further demonstrate the pervasiveness of official misconduct in this case. I note that Kyles this new claim should not be held to be an abuse of the writ, assuming that this case makes its way back to federal court. As a general rule, I would of course agree that any constitutional claims raised for the first time after the district court denies an original habeas petition are abused. *See McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). However, because Kyles' new claim adds further fuel to the fire in terms of my concerns about whether Kyles was wrongly convicted, I would hold that the claim is not abused under the exception that permits claims to be raised for the first time in a successive habeas petition if a petitioner makes a "colorable showing of factual innocence." *See id.* at ——, 111 S.Ct. at 1471.

I further observe that the "materiality" standard regarding intentionally perjured testimony is "considerably less onerous" than the *Brady* "materiality" standard set forth in *United States v. Bagley*. *See Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir.1993). In cases where the prosecution intentionally procured or countenanced perjured testimony, a court must order a new trial if there was "any reasonable likelihood that the false testimony could have affected the jury's verdict." *Id.*

61. Even if Beanie Wallace had claimed that the car was retrieved on Thursday early in the evening—before the license numbers were recorded by police—Wallace's two inconsistent statements given to police would have been available to impeach Wallace's credibility on this point.

plete list of the cars in the lot at the time; therefore, it is evidence that would carry little if any exculpatory weight . . . ." The testimony to which the district court referred was given by Detective John Miller, who testified that the print-out was incomplete and likely did not include the parking lot that was supposedly depicted in the blown-up police photograph offered into evidence at trial.

I believe that the district court erred by accepting Miller's testimony as conclusive. Assuming the print-out was available to the defense at the time of trial, defense counsel would have been free to argue that the list was a complete one. Indeed, I observe that the list contains seventeen different license numbers, and the memorandum attached to it states "attached you will find a print out of vehicles which were parked in *the parking lots around Schweggmans [sic] on 9-20-84 at 9:15 p.m.*" (emphasis added). The memorandum does not state that it is a "partial" list or that it was a list of vehicles in a portion of the Schwegmann Bros.'s parking lot. This memorandum, by not qualifying the scope of the police's search of automobiles in the Schwegmann Bros.'s parking lots in any manner, belies Detective Miller's claim. Finally, Miller's name does not appear among the five police officers' names listed on the memorandum. The issue of whether the list was or was not complete would have been a quintessential jury question.

2) The police garbage memorandum

As discussed, *supra*, with respect to Beanie Wallace's September 21, 1984 suggestion to police regarding the garbage, the State also failed to disclose police memoranda relating to the search and seizure of the garbage in front of Pinky Burnes' apartment on September 24, 1984. In particular, Kyles points to a memorandum dated "9-23-84" from Sergeant James Eaton to Sergeant Dave Morales that states "[w]e have reason to believe" Mrs. Dye's personal effects and Schwegmann's bags would be in the garbage scheduled to be picked up by sanitation workers on Monday morning. Like Wallace's recorded statement to police in which he makes the garbage tip, I believe that this would have been valuable evidence that would have bolstered the theory of the defense that Wallace "framed" Curtis Lee Kyles.

e) The remainder of the State's case

Once the effect of all of the *Brady* evidence is considered, what is left of the State's case is tenuous at best. The majority points to the fact that the murder weapon, a homemade holster, bullets, and pet food supposedly purchased by Mrs. Dye at Schwegmann Bros. were found in Pinky Burnes' apartment as strong circumstantial evidence of Kyles' guilt. I disagree. Kyles took the stand and claimed that the weapon and holster did not belong to him and must have been planted. While ordinarily such a self-serving claim indeed would have little weight, the majority ignores the strong circumstantial evidence that Beanie Wallace in fact planted evidence—namely, his tips to police that they "would be smart" to look in the garbage and they could "set up" Kyles and find the murder weapon. The majority also ignores the evidence that Wallace had a ready opportunity to plant the evidence during the "Sunday dinner" at Pinky Burnes' residence.

With respect to the pet food found in Pinky Burnes' apartment, Kyles testified that he had purchased the cans at the Schwegmann Bros.—which was located "very near" Pinky Burnes' apartment, according to trial testimony—during the previous week or so. While Kyles claimed that he remembered the items being "on sale," the State introduced evidence that the particular brands of pet food were not sale-priced but instead were regularly priced. The majority contends that this testimony undermines Kyles' explanation for the presence of the pet food. However, a closer reading of Kyles' testimony undercuts this supposedly damning bit of impeachment evidence about what was actually a collateral matter.[62] Further-

62. The alleged existence of a sale price was gratuitously offered by Kyles during his testimony. It was not as if the pet food allegedly purchased by Kyles and that supposedly purchased by Mrs. Dye were distinguishable by the fact that one was on sale and the other was not. Indeed, the State's own evidence established the contrary. Furthermore, I believe that the State and the majority put entirely too much stock in the import of Kyles' testimony. The following colloquy occurred between the prosecutor and Kyles:

Q. [prosecutor:] How do you know it was on sale?

A. [Kyles:] Because they had a little sign that said three for such and such, two for such and such at a cheaper price. It wasn't even over a dollar.

Q. There was a sign where?

A. In the Schwegmann's Supermarket. . . . It wasn't big. It was a little bitty piece of slip like they had on the shelf. As I was looking at the cat food, I was looking at these many for so much [sic].

Q. They had two different signs [for the two brands purchased]?

A. They have a sign by every item in there.

Kyles, whose intelligence is limited, *see Kyles v. State*, 513 So.2d at 274 (noting Kyles' IQ is 83), appears to me to have been inartfully explaining that he believed that the cans of pet food were "on sale" simply because they were marked two or three for a particular price. His reference to a sale "sign" actually appears to be referring to stock labels that are commonly used in grocery stores and regularly appear on the shelf (as he stated, "a little bitty piece of slip like they had on the shelf . . . . They have a sign by every item in there.").

63. As discussed in *supra* Part I., Wallace's various statements indicate he was in fact in possession of the car, as Kyles claimed, at least by Friday. To corroborate his claim that he bought transmission fluid for his car, Kyles also offered into evidence a color photograph of his car apparently leaking some type of oily fluid.

64. Perhaps the only consistent point in all of Wallace's statements to police was that there were numerous bags of Schwegmann Bros.'s groceries in Mrs. Dye's car.

more, I read Kyles testimony to actually bolster his credibility in one significant respect. *Before being shown the cans by the prosecutor—cans that were seized and in the possession of the State at trial*—Kyles stated that the pet food cans were priced "two" or "three for such and such. . . . It wasn't even over a dollar." During cross-examination, the cans were *first introduced by the prosecutor* after Kyles had testified about them being "on sale." The prices were revealed as in fact being "two for 77 cents" and "three for 89 cents." The actual prices of the cans fully and precisely comport with Kyles' description. I simply do not believe that this is mere coincidence. Also with respect to Kyles' claim that he purchased the pet food for his children's own pets, the state habeas courts and the federal district court ignored the important fact that one of the State's own photographs offered into evidence at trial depicts the inside of a closet in the apartment in which a half-empty bottle of pet shampoo is clearly visible.

The State also has argued that the Schwegmann's sales receipt bearing Kyles' fingerprints that was found in Mrs. Dye's car is strong circumstantial evidence against Kyles. Kyles testified that he indeed did ride in the car, which Wallace at that point possessed, on the Friday, September 21, 1984—one day after the murder. Kyles stated that Wallace came by Pinky Burnes' residence and the two drove to Schwegmann Bros., where Kyles purchased a can of transmission fluid and a package of cigarettes.[63] At trial, Kyles theorized that the receipt must have fallen out of the bag into the car when he removed the items. As noted in *supra* Part I., *the receipt was the only physical evidence offered by the State that bore Kyles' fingerprints. Not the murder weapon. Not the purse or any other of Mrs. Dye's belongings. And not Mrs. Dye's car.*

Under scrutiny, the sales receipt, like the rest of the State's evidence, not only fails to incriminate Kyles but actually supports the theory of the defense. To begin with, the receipt was only approximately two inches long. Yet Mr. Dye testified that he believed that his wife was shopping for *an entire week's groceries* not only for Mr. and Mrs. Dye, but also for houseguests. Mr. Dye testified that his wife usually brought home six or eight bags of groceries whenever she went shopping at Schwegmann Bros.[64] The State never explained the obvious variance between the length of the receipt with Kyles' fingerprints on it and the length of the receipt that would have resulted from a week's grocery-shopping.

Also notable is the fact that a State's witness who testified about the receipt stated that the receipt was recovered from "the right front floorboard," i.e., the passenger's compartment. Kyles testified that Wallace drove him to Schwegmann Bros. and, thus, his claim is consistent not only with the length of the receipt but also the placement

of it in the passenger's compartment. Because the police destroyed writing on the receipt in removing Kyles' fingerprints from it, there is no way to know with certainty whether the receipt in fact memorialized a purchase on the day of the murder or on the next day, as Kyles claimed. However, the circumstantial evidence supports Kyles' version of events.

The last significant piece of evidence offered by the State at trial was a blurry, blown-up photograph of what the State claimed is Kyles' rust-colored Mercury parked in the Schwegmann Bros.' parking lot shortly after the murder. The blow-up is actually part of a crime-scene photograph taken immediately after the murder. Apparently, the police discovered what they believed was Kyles' car well after the time of the crime. The photograph shows only a small fraction of the right side of a tan, orange, or perhaps rust colored American-made car, which appears to be a two-door model and which has a vinyl top. It is impossible to discern the make or model of the car. The State also offered two pictures of Kyles' rust-colored Mercury, which also has a vinyl top, although the pictures only depict the car from the front and back; the photograph of the back of Kyles' car is of limited value since the trunk is open, which blocks the vast majority of the backside. There is no way to identify whether the vehicle in the crime-scene photograph is Kyles' car. Thus, the State's photographic evidence here is of extremely limited—if any—probative value.[65]

Finally, it seems that at least some weight should be given to the many witnesses who testified in Kyles' defense. Numerous witnesses testified that Beanie Wallace was not only in possession of a bright red automobile resembling Mr. Dye's car immediately after the time of the murder, but also that Wallace was anxious to sell the car. Those witnesses also testified that Wallace's hair was braided. Although those witnesses were either friends or family of Kyles, at least two of them—Ronald Gorman and Johnny Burnes—were also friends of Wallace.[66] Another of those witnesses, Kevin Black, was employed as a security guard for the municipal airport in New Orleans—a position of some trust, which reflects positively on his credibility. Two defense witnesses also testified that Beanie Wallace had romantic aspirations for Pinky Burnes, thus providing an additional motive for Wallace to frame Kyles.[67]

III.

In conclusion, after a painstaking review of the entire record, I am convinced that Curtis Lee Kyles should receive a new trial. As a result of both a series of *Brady* violations and a related ineffective-assistance-of-counsel violation, Kyles' jury was not permitted to consider much of the relevant evidence. Because my confidence in both the jury's guilty

65. I am curious as to why the State did not offer a photograph of Kyles' car from the same angle as the car depicted in the crime-scene photograph—which would have greatly facilitated a comparison. The crime-scene photo reveals the angle of the vinyl top on the car and also shows a large metal strip of molding that runs along the edge of the vinyl top. The State's photographs of Kyles' car reveal neither the angle of his vinyl top nor whether there is metal molding comparable to that on the car in the crime-scene photograph. The small portion of the vinyl top of Kyles' car appears *not* to have metal molding running along the edge, although I cannot be certain from the State's photographs.

66. In Wallace's first recorded statement, he repeatedly refers to Johnny Burnes as his "partner" and housemate. In a subsequent statement, Wallace stated that he drove around the French Quarter with Gorman on the night after the murder.

67. As discussed in connection with Wallace's first recorded statement, it was also obvious that Wallace hoped to receive remuneration for assisting the police. As he told police during the September 22 conversation, "I ain't doin' this for nothing, you know." An additional motive is evident from statements that Wallace made during the first recorded conversation with New Orleans police. Among other things, Wallace stated:

i) "I betcha ... I can get in a lot of trouble with the shit?"—making reference to the fact that he was in possession of Mrs. Dye's car;
ii) "Am I going to jail?"; and
iii) Wallace stated that he feared that "I would be charged" with Mrs. Dye's murder because "a [black] male ... in his twenties" committed the murder.

verdict and death sentence are undermined, I would grant the writ of habeas corpus.

Judge Learned Hand once wrote that "[o]ur procedure has always been haunted by the ghost of an innocent man convicted. It is an unreal dream." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y.1923). I fear that in this instance it is not simply a dream. I therefore dissent.

APPENDIX A

Curtis Lee KYLES

v.

John WHITLEY, Warden Louisiana State Penitentiary, Angola, Louisiana.

Civ. A. No. 90-4031.

United States District Court, E.D. Louisiana.

March 24, 1992.

ARCENEAUX, District Judge.

ORDER AND REASONS

Petitioner Curtis Lee Kyles seeks a writ of habeas corpus testing his conviction of capital murder and his sentence of death. His execution was stayed by order of this court on November 2, 1990.

Procedural Background

On December 7, 1984, Curtis Lee Kyles ("Kyles") was convicted of first degree murder under La.Rev.Stat. 14:30 and was sentenced to death. His conviction and death sentence were affirmed by the Louisiana Supreme Court in State v. Curtis Lee Kyles, No. 86-KA-0800,[1] which was rendered on September 9, 1987; rehearing was denied on October 17, 1987. Petitioner then applied to the Supreme Court of the United States for a Writ of Certiorari which was denied without evidentiary hearing on May 23, 1988; rehearing was denied on August 17, 1988.

On January 2, 1989, Kyles petitioned the Criminal District Court for the Parish of Orleans, State of Louisiana, for a Stay of Execution, Post-Conviction Relief, Writ of Habeas Corpus, Evidentiary Hearing, and Motion for New Trial on the basis of newly discovered evidence. Kyles alleged in this petition that his constitutional rights had been violated in twenty ways. Kyles was not granted an evidentiary hearing, and his application was denied on January 6, 1989. This decision was appealed to the Louisiana Supreme Court by Application for Supervisory Writ. The Louisiana Supreme Court granted the application for the writ and ordered an evidentiary hearing in the criminal district court.

An evidentiary hearing was conducted intermittently from February 20, 1989, to June 1, 1989. Judge Dennis Waldron of the Criminal District Court for the Parish of Orleans denied petitioner's motions and rendered a judgment.[2]

On April 2, 1990, petitioner filed an Amended and Supplementary Application for Supervisory Writs to Review Final Judgment of the Criminal District Court for the Parish of Orleans, Section "F", denying State Order and Post Conviction Relief. On September 14, 1990, the Louisiana Supreme Court in a 5 to 2 opinion, denied the application without reasons.

On September 28, 1990, the Louisiana Supreme Court denied a motion for a stay order and suggested that Kyles apply to the federal court system.

On October 2, 1990, Judge Waldron issued a Warrant of Execution ordering Kyles to be executed on November 8, 1990. Kyles then petitioned the United States Supreme Court to stay the execution. The Supreme Court denied that motion on October 26, 1990.

Kyles then filed the instant petition requesting a stay of execution under 28 U.S.C. § 2254. After having filed the petition, Kyles supplemented it by adding a claim that the electric chair, then in use in Louisiana,

1. 513 So.2d 265 (La.1987), *cert. denied*, 486 U.S. 1027 [108 S.Ct. 2005, 100 L.Ed.2d 236], *reh'g denied*, 487 U.S. 1246 [109 S.Ct. 4, 101 L.Ed.2d 955] (1988).

2. Judge Waldron has presided over all of the proceedings in this matter in criminal district court.

APPENDIX A—Continued

violated his constitutional rights. This claim had not been exhausted in the state court system; therefore, this court allowed Kyles to withdraw the supplemental petition to pursue those claims in the Louisiana court system.

The criminal district trial court denied defendant's electrocution-based writ application. Kyles then applied for writs to the Louisiana Supreme Court which were denied on May 24, 1991. On June 5, 1991, the court received notification of the Louisiana Supreme Court's decision and a request that it take up this issue as well as those held in abeyance at that time. Kyles objected to this course of action because he intended to raise the electrocution issue by writ to the United States Supreme Court.

On June 25, 1991, Louisiana changed its method of execution from electrocution to lethal injection. The law became effective on September 25, 1991, thereby mooting this issue.

This court ordered additional briefing concerning any developments in the law since the time that the petition was originally filed which briefing was received in early September of 1991.

The Court has reviewed in detail, inter alia, the transcripts of the hearing held on Kyles' motion to suppress identification and on his motion to suppress evidence; the trial transcript and evidence adduced in that proceeding; and the post-trial proceedings transcripts and the evidence adduced there; the copious pleadings, briefings, exhibits, and statements filed in conjunction thereto, and the applicable law. The Court firmly believes that Kyles was given a fundamentally fair trial with able assistance by counsel. For the reasons that follow, the Court rejects Kyles' petition for habeas corpus relief.

3. The facts of this case are set out in great detail in *State v. Kyles*, 513 So.2d 265 (La.1987). It should also be noted at the outset that the first trial of Kyles for this murder ended in a mistrial after four hours of deliberation by a jury. This conviction arises from a second trial.

4. At the post-conviction hearing, Detective John Miller testified that he had spoken to Beanie on no more than half a dozen occasions concerning various, unrelated shootings. This instance was the first that Detective Miller could use Beanie's information because it was a homicide. (Transcript of Post-Conviction Relief Hearing, Detective Miller, February 24, 1989, at 3.) The court notes this fact because of petitioner's allegations that Beanie was an unreliable source.

Facts of the Case

At approximately 2:20 p.m. on September 20, 1984, Mrs. Dolores Dye, a 58-year old white female was murdered in the parking lot at Schwegmann's Giant Supermarket at 5300 Old Gentilly Road, New Orleans, Louisiana.[3] Four people who witnessed the incident testified at the trial.

The testimony established that a black man accosted the victim as she placed her groceries in the trunk of a red Ford LTD. One witness testified that the victim threw her purse into the trunk, slammed the lid, and tried to get away. The assailant chased her and wrestled her to the ground. When she attempted to escape again, the robber grabbed her arm, drew a revolver from his waistband, and fired it into her left temple, killing her instantly. The gunman then took her keys from her hand, got into her car, and drove slowly from the parking lot.

The police were aided in their investigation when on Saturday night at about 10:00 p.m. Joseph "Beanie" Wallace informed police investigators he had purchased a red Ford LTD the previous day from defendant.[4] The police determined that the car was registered in the victim's name.

After having ascertained Kyles' name and address from Beanie, who specifically pointed out Kyles' apartment to the authorities, the police picked up five identical sacks of garbage outside of his home at approximately 1:00 a.m. on September 24, 1984. Inside one of these garbage bags, the victim's purse and personal belongings were found. At 6:07 p.m. on September 23, 1984, a search warrant for Kyles' house was issued.

At approximately, 10:00 a.m. on the 24th of September, 1984, Kyles was arrested outside his home. Police recovered a .32 revolver, which was later determined to be the murder weapon, from behind the stove in his kitchen, as well as a hand-made holster, which fit the

APPENDIX A—Continued

murder weapon and which was found in a chifferobe in the hall, various boxes of ammunition containing bullets which could be used in the murder weapon, and a rifle. In a kitchen cabinet, the police found groceries in Schwegmann's bags, including brands of dog and cat food normally purchased by the victim.

Partial fingerprints were found on the victim's effects, but none was sufficient for a positive identification. No fingerprints were found on the .32 revolver or in the LTD, although defendant's prints were recovered from a Schwegmann's cash register receipt found on the floor of the car. However, the chemical process used to raise the fingerprints on the register receipt destroyed the inked printing on the paper, thus making it impossible to determine what the receipt was for or when the purchase was made.

Three of the eye-witnesses to the murder picked defendant out of photographic lineups conducted on September 24, 1984. These witnesses, as well as a fourth who had not been asked to make a photographic identification, also positively identified defendant at trial as the murderer.

The defense contended at trial that the informant, "Beanie" had actually committed the murder and had framed Kyles. The defense presented several witnesses who saw Beanie in a red car similar to the victim's about an hour after the killing.[5] Other witnesses testified that Beanie had attempted to sell the car shortly after the murder.

The linchpin of the defense, however, was the defense's theory that Beanie had planted all of the incriminating evidence on Kyles. Evidently, a Sunday dinner was served at Kyles' "home" [6] on September 23, 1984. Testimony conflicted greatly as to the number of adults present at the meal and what was served. The defense maintains that it was then that Beanie framed Kyles.

5. All of these witnesses were either close friends of the defendant or related to the defendant's girlfriend and mother of his children, "Pinky" Burnes.

To that end, Johnny Burnes, Kyles' common-law-brother-in-law, testified that he saw Beanie stoop down behind the stove where the gun was found. (Trial Transcript, Burnes' Testimony, pp. 259–89, at 263.) Kyles testified that the holster was not his and must have been planted in the chifferobe. The same explanation was given with respect to all of the ammunition. Kyles further testified that the rifle found belonged to Beanie. He explained that because Kyles had lent Beanie $20.00, Beanie had given him the rifle as collateral. (Trial Transcript, Kyles' Testimony, pp. 318–374, at 319). The motive for this "frame job" was Beanie's alleged romantic interest in Martina "Pinky" Burnes, Kyles' common-law wife and mother at that time of four of his children, as previously noted.

Kyles denied any involvement in the shooting, explaining his fingerprints on the cash register receipt by asserting that Wallace had picked him up in a red car the day after the murder and had taken him to Schwegmann's where he purchased transmission fluid for his car and a pack of cigarettes. He suggested that the receipt might have fallen from the bag when he removed the cigarettes. As to an explanation concerning the presence of dog and cat food, there was varying and conflicting testimony from all of the defense witnesses as to whether or not Kyles or his children had a dog or cat.

On rebuttal, Beanie was brought into the courtroom. Each of the four eye-witnesses attested that Kyles, not Beanie, was the person that each saw commit the crime. The jury and the court were given the opportunity to see any possible resemblance between the two.

After being charged and deliberating, the jury unanimously found defendant guilty of first degree murder.

In the sentencing phase, the prosecutors relied on the evidence adduced during the guilt phase of the trial. The defense called two of the defendant's sisters and two of his

6. The court uses the term "home" loosely. The apartment in question was the apartment of Kyles' girlfriend where she resided along with her four children by Kyles and where he evidently stayed with some frequency.

APPENDIX A—Continued

brothers who testified that defendant had a close relationship with his children and loved and supported them. Defendant also took the stand and continued to assert his innocence.

The jury unanimously recommended the death penalty, finding as the sole statutory aggravating circumstance that the killing occurred during the commission of an armed robbery.

At the post-conviction hearing ordered by the Louisiana Supreme Court, the trial court received testimony concerning twenty issues, among other things, alleged Brady materials which had not been turned over to defendant, ineffectiveness of counsel, and approximately 18 other violations. After the hearing which was conducted on intermittent days, Judge Waldron issued a judgment denying Kyles' motion for a new trial and the relief sought in his Writ of Habeas Corpus.

As previously stated, petitioner then filed an Amended and Supplementary Application for Supervisory Writs to Review Final Judgment of the Criminal District Court for the Parish of Orleans on April 2, 1990. After the Supreme Court of Louisiana denied writs without written reasons, the same issues were raised by counsel for Kyles in the instant § 2254 petition which the Court will now address.

Issues Presented

I. Denial of Motion for Stay of Execution, Evidentiary Hearing and Motion for a New Trial

Kyles claims a violation of his due process rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because Judge Waldron denied his Motion for Stay of Execution, Evidentiary Hearing and Motion for New Trial without a hearing on January 6, 1989. Petitioner states, "Based upon the true allegations set forth in the Application for Supervisory and Remedial Writs, Curtis Kyles should have prevailed."

First, it appears from the recitation of the procedural history of this case as supplied by Kyles that the Supreme Court ordered an evidentiary hearing in Criminal District Court on the motion for new trial and the writ of habeas corpus contained in defendant's January 2, 1989, pleadings, which hearings were conducted over a period of months from February 20, 1989 to June 1, 1989, and which served as the basis for Judge Waldron's judgment dated November 9, 1989. Thus, it seems illogical to argue that Kyles' rights were violated when the Supreme Court of Louisiana, acting upon Kyles' applications for relief, ordered a hearing for that precise purpose and the criminal district court obeyed that order.

Furthermore, as previously noted, filed in conjunction with the motion for new trial and motion for an evidentiary hearing, was Kyles' application for a writ of habeas corpus. As such, the state court proceedings of which Kyles complains were collateral in nature and not direct challenges to the validity of his conviction. The state court's alleged error in the conduct of its habeas proceedings presents no constitutional violation. *See Byrne v. Butler*, 845 F.2d 501, 509–10 n. 8 (5th Cir.), *cert. denied*, 487 U.S. 1242, 108 S.Ct. 2918 [101 L.Ed.2d 949] (1988); *Millard v. Lynaugh*, 810 F.2d 1403, 1410 (5th Cir.), *cert. denied*, 484 U.S. 838, 108 S.Ct. 122 [98 L.Ed.2d 81] (1987). This claim is without merit.

II. Brady Violations

Kyles maintains that the state failed to meet its obligations to provide to defendant exculpatory materials under *Brady v. Maryland*, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963), and its progeny. The materials claimed to have been wrongfully withheld are:

A. a recorded statement obtained when the officers, following up on Beanie's phone call concerning Mrs. Dye's vehicle, met Beanie;

B. a computer print out which listed license plate numbers of the cars in Schwegmann's parking lot on the evening of the murder;

C. an inter-office memorandum directing Kyles' garbage to be picked up with the implication that evidence was to be found therein.

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The suppression by a prosecutor of evidence favorable to and requested by an accused violates due process when the evidence is material either to guilt or to punishment, irrespective of the prosecutor's good or bad faith under *Brady*. *Id.* However, the nondisclosed evidence must be material. The suppression of evidence violates due process "only if it deprives the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381 [87 L.Ed.2d 481] (1985). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*, 473 U.S. at 682, 105 S.Ct. at 3383.

Petitioner has urged this court to adopt a heightened standard in this instance in relation to the "harmful effect of withheld exculpatory evidence in capital sentencing." (Memorandum of Facts and Law filed in conjunction with Petition at 40). Kyles urges instead to use the "no effect" standard found in *Caldwell v. Mississippi*, 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231] (1985), or the "harmless beyond a reasonable doubt" standard referred to in *Satterwhite v. Texas*, 486 U.S. 249 [108 S.Ct. 1792, 100 L.Ed.2d 284] (1988). While this court declines petitioner's invitation to use these different standards in its analysis, it notes that even if it did, it would find that the evidence withheld did not have any adverse-due process effect, no matter which of the three standards were applied.

A. The Recorded Statement

The recorded statement at issue was made by the police simply as a precaution for the officer who was wearing the "wire." The police file was not turned over the district attorney until after the trial. Thus, the prosecution did not have the information to turn over in a timely fashion.

Kyles alleges that had he had the tape recording he would have learned that:

1) Beanie knew in what area of Schwegmann's parking lot the murder was committed;

2) Beanie had said that Kyles wore a "bush" hairstyle in contrast to testimony that the killer had "plaits";

3) Beanie asked for $400 for the purchase price of the victim's car and was assured by the police that he would be paid;

4) Beanie suggested to the police officers that Kyles might put incriminating evidence in his garbage; and

5) Beanie feared apprehension because he had been seen driving the Dye automobile.

First, the characterization of these "facts" being established by this tape as argued in Kyles' petition is not a fair rendition of the material contained in the tape itself. Secondly, the material does not exculpate Kyles. Finally, as to fitting "hand in glove" with the defense's position that Beanie framed Kyles, the fact is that after reviewing all of the testimony presented, the defense's theory has no viable or credible evidence to support it. In this court's judgment, the jury's verdict would not have been different had this information been available to the defense.

B. The Computer Print-Out

With respect to the computer print-out, at the evidentiary hearing, the defense learned that the list was not a complete list of the cars in the lot at that time; therefore, it is evidence which would carry little if any exculpatory weight and bears so little materiality that it fails to fit the *Brady* mold. (Post-Conviction Hearing, Detective John Miller, February 24, 1989, at 11).

C. The Inter-Office Memo

The court rejects the *Brady* argument with regard to the interoffice memo concerning the statement that "[w]e have reason to believe the victim's personal papers and the Schwegmann's bags will be in the trash." First the only "garbage" statement contained in the transcript of the tape is Sergeant Eaton's recital that Beanie said, "his garbage goes out tomorrow said if he's smart he'll put it in garbage. He said but he ain't that smart." (sic) [7] Sergeant Eaton did order the

7. Eaton also testified that the transcript of the tape was incorrect in that Eaton is the one who

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garbage to be picked up, but the bags that were picked up were identical, which renders improbable, if not impossible, the defense's argument that Beanie planted a bag of garbage.

To that end, the defense asks this court to rely on the hearsay statement of Martina "Pinky" Burnes, who defense counsel Martin Regan said that he could not rely upon in preparing Kyles' defense. Pinky stated that Steve Turner, who lived with the Burneses (as did "Beanie"), told her that he saw Beanie take a garbage bag and fill it with garbage from the neighbors' trash on North Dorgenois Street in the evening hours of Sunday, September 23, 1984, "apparently to drop off the garbage bag in which he had placed Mrs. Dyes' purse in front of Curtis' residence." (Post–Conviction Hearing, Testimony of Martina Burnes, April 7, 1989, at 21–22). In order to give any credence to this story, Beanie would have to have known and used the same type garbage bags that Kyles used since they all resemble one another. This court finds Martina's testimony incredible considering that she had the opportunity to raise these points before Kyles' trial and did not.

A complete reading of the record convinces this court of Kyles' guilt and that he received a fair trial. The positive identification by four witnesses of Kyles as the perpetrator when each witness was given the opportunity to view Kyles and Beanie together, combined with the jury's opportunity to compare these two individuals to decide whether they had a reasonable doubt that Beanie could be mistaken for Kyles, combined with the varying and inconclusive testimony of Kyles' friends, leads this court to the ineluctable conclusion that the *Brady* materials were not material, that they would have made no difference in the outcome of this trial, and that there is no probability (much less a reasonable probability) that disclosure of any of the so-called "*Brady* materials" would have changed the result of the proceedings.

III. Ineffective Assistance of Counsel

Kyles has alleged nine errors of counsel prior to trial, nine errors of counsel during trial, and two errors after trial, which Kyles claims resulted in his having been denied effective assistance of counsel in contravention of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. Defendant asserts that had he received effective assistance of counsel "there is a reasonable probability, if not a certainty, that the outcome of both the guilt phase and the sentence phase of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984)."

Under Strickland, Kyles is required to satisfy a two part test to merit relief on claims of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient ... that counsel was not functioning as the "counsel" guaranteed ... by the Sixth amendment. Second, the defendant must show that the deficient performance prejudiced his defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064. Only if petitioner proves both elements, is he entitled to relief.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2065. However, this means that the court must not employ hindsight in making its fair assessment of defendant's claims. The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* 466 U.S. 690, 204 S.Ct. at 2066; *Earvin v. Lynaugh*, 860 F.2d 623, 625 (5th Cir.1988), *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1558 [103 L.Ed.2d 861] (1989).

Second, Kyles must demonstrate that there is a reasonable probability that but for counsel's conduct, the result of the proceed-

made the comment that "[Kyles] was not that smart," because Eaton "did not want Beanie to have any knowledge of what [Eaton] may do later." (Post–Conviction Hearing, Sergeant Eaton, March 3, 1989, at 65).

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ing would have been different. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. As stated by the *Strickland* court:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that absent the errors, the sentencer—including an appellate court, to the extent it independently weighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. 466 U.S. at 697–98, 104 S.Ct. at 2068–69.

Finally, this circuit has held that if a state court record is clearly adequate to fairly dispose of the claims of inadequate representation, further inquiry is unnecessary. *De Luna v. Lynaugh*, 873 F.2d 757 (5th Cir. 1989), *cert. denied*, 493 U.S. 900, 110 S.Ct. 259 [107 L.Ed.2d 208] (1989). In this instance, the court finds that the state court record meets this standard, and thus, this court will not entertain another evidentiary hearing.[8]

Within this framework the following issues were raised by petitioner:

A. Ineffective Assistance Prior to Trial[9]

1. Kyles alleges that counsel was ineffective with respect to the motion to suppress evidence recovered from the garbage, because he did not call as a witness Detective Miller, another policeman involved in the investigation who, defendant maintains, would have testified that the garbage was picked up because of Beanie's tip.

This claim is without merit for various reasons. To begin with, defendant has no constitutional right of privacy in his garbage. *California v. Greenwood*, 486 U.S. 35 [39–43], 108 S.Ct. 1625, 1628–30 [100 L.Ed.2d 30] (1988); *United States v. Vahalik*, 606 F.2d 99, 100–01 (5th Cir.1979); *Louisiana v. Kyles*, 513 So.2d 265, 269 (La.1987). Therefore, it is irrelevant how the police decided to pick up those five bags. Next, this assertion is based on information obtained *after* trial which this court is not allowed to consider as

8. It is important to also note that a state court's findings of fact are entitled to a presumption of correctness under § 2254(d) unless one of the eight exceptions is present. 28 U.S.C. § 2254(d). The presumption of correctness extends to implicit fact findings. *Thompson v. Linn*, 583 F.2d 739, 741–42 (5th Cir.1978).

9. Petitioner had Attorney Samuel Dalton testify at the post-conviction evidentiary hearing. Mr. Dalton was presented as an "expert" in defense of death penalty cases. As a hired expert, it is not surprising that he opined that with all of the "errors" committed by counsel Martin Regan, an entirely different trial would have ensued. However, this court cannot approach this question as though it has no experience in trial advocacy and the rigors of criminal cases.

In the instant matter, Mr. Regan was retained counsel for Kyles. Mr. Regan has appeared before this court under similar circumstances, albeit never in a capital case, on numerous occasions. The court notes for the record that Mr. Regan has consistently conducted himself as an extremely careful and zealous defense lawyer.

It is impossible for this court to place much credence in this "expert's" opinion.

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discussed above. Thus, this assertion does not state a valid ineffective assistance claim.

2. Kyles asserts that it was ineffective assistance for Regan not to have moved for a continuance to ascertain from residents around 2313 Desire St. (Pinky's residence) how many bags of garbage they put out on the day in question and whether they saw anyone else place a garbage bag in front of the house. This argument, again, is based on defendant's post-trial hindsight which the court will not consider as providing evidence of allegedly deficient trial conduct. Furthermore, from the evidence, it is apparent that all of the bags were the same and were "lined up" when picked up indicating that they probably came from Kyles' apartment.

3. Petitioner argues that counsel erred in his failure to interview Steven Turner, who allegedly told Martina ("Pinky") Burnes that he saw Beanie fill a garbage bag and leave his house on North Dorgenois. (See discussion, *supra*). Again this claim goes back to the alleged "tip" from Beanie about the garbage of which counsel had no knowledge when his alleged failure to interview Turner would have had any relevance. In addition, it would appear that counsel was unaware of Turner's alleged discussion with Pinky. As such, the allegation is based on hindsight which the court will not consider. Furthermore, the picture in evidence of the five garbage bags belies this story in its entirety.

4. Regan was also allegedly ineffective because he failed to investigate and interview Marrian Burnes who allegedly saw the murder weapon in Beanie's possession one or two weeks prior to the murder. This information is so inconsequential in relation to the rest of the evidence that it cannot be said that the result of the proceeding would have been different had Regan known; therefore, no prejudice is demonstrated.

5. Regan's failure to interview the eyewitnesses of the shooting was erroneous and prejudiced Kyles, the defendant claims. The Court finds no merit in this argument. Regan had more than adequate opportunity to cross-examine three of the eye-witnesses at the motion to suppress—when all were under oath.[10] His election not to further interview them or obtain statements was not unreasonable and appears to have been in the nature of a reasonable, tactical decision on the part of defense counsel that the court will not second guess. In addition, Kyles has not presented how such witness interviews would have resulted in a different trial outcome. The trial in question was fundamentally fair.

6. Kyles claims that counsel should have demanded an *in camera* review of the homicide file. This entire claim is based on hindsight and as such is not subject to review by the Court. Furthermore, considering that the Court has previously ruled that the failure to turn over this *Brady* material did not result in Kyles receiving an unfair trial, this claim is without merit.

7. Kyles argues that counsel was "patently ineffective in allowing the state to hide such significant evidence" as the taped conversation. As this court has stated, this "taped conversation" looked at in the light of all of the other evidence adduced at trial and at the post-conviction hearing, is not the "smoking gun," as defense counsel insists on characterizing it. In addition, this is yet another "hindsight" call which the court will not consider.

8. Counsel was ineffective because he did not advise two of the defense witnesses to go to the police or the district attorney with "information ... that Beanie was the murderer of Dolores Dye" which information counsel learned "at least two weeks after Curtis' arrest." This assertion by Kyles

10. Regan cross-examined Isaac Smallwood, Henry Williams and Robert Territo at a motion to suppress held on November 6, 1984, all of whom testified at trial. Only Darlene Cahill, the fourth trial eye-witness was not questioned and that is because she had not participated in the photographic line-up at issue therein.

The Court notes that the identifications made by each of these persons was absolute. Much has been made over Smallwood having embellished his recounting of what he saw on the day of the shooting at trial. However, comparing his statement, his testimony at the hearing on the motion to suppress, and the testimony at trial, this court believes that at a minimum this individual was able to see the perpetrator's face and that the identification is valid. Smallwood's embellishment is not prejudicial error.

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overstates at best, or misstates at worst, what this court can glean from the record.

The citations provided by counsel to support this claim do not deal with these two persons having informed Regan two weeks after Kyles' arrest that Beanie was the murderer of Dolores Dye. The Regan testimony of February 20, 1989, at the Post–Conviction Hearing beginning at page 17 deals with Beanie's allegedly having murdered two other people. Kevin Black's entire testimony consists of his having seen Beanie in the Dye car immediately after the shooting. Johnny Burnes most incriminating statement at trial about Beanie was that he saw Beanie placing something behind the stove at the now infamous Sunday night dinner.

To begin the analysis, the criminal trial court found that Johnny Burnes testimony is totally without merit or worthy of consideration because of his demeanor in court and because he had been convicted of the murder of Beanie. This court concurs in this finding. Both Burnes' trial testimony and post-conviction hearing testimony are incredible. It was not until this post-conviction hearing (which occurred after Beanie's demise) that Burnes thought about retrieving from his memory the "fact" that Beanie told him that Beanie had killed Mrs. Dye. Indeed, Sergeant Raymond Miller, who took Burnes' statement about Beanie's involvement with another (the Leidenheimer) murder, believed from Burnes' statement that Burnes himself was involved in that murder. (Post Conviction Hearings, Raymond Miller, March 3, 1989, at 46–47).[11]

As to Black's testimony, again the court cannot find that his being "discredited" by the fact that he did not go to the police had an effect on the fairness of the trial in light of the totality of the evidence adduced. Petitioner has not proven any prejudice resulted from the alleged error of counsel.

9. In petitioner's memorandum of facts and law, not in the petition itself, Kyles finally argues that Regan's failure to interview Beanie himself was error. However, this decision was one which was rationally made by a competent defense lawyer. Beanie was considered by Regan to be the proverbial "loose cannon." Considering that Regan's entire defense hinged on pinning the murder on Beanie, it is difficult to comprehend how interviewing Beanie would have made any appreciable difference. Surely, Kyles could not have expected a Perry Mason confession from Beanie had Regan interviewed him. This "error" was not prejudicial.

B. Ineffective Assistance During Trial

1. A major issue raised in petitioner's post-conviction motions heard before Judge Waldron, repeated here, is that it was ineffective of counsel not to call Beanie to the stand. Regan has opined that he did not do so because he misunderstood Louisiana law on that issue at the time; he believed he would have to prove both hostility and surprise in order to lead Beanie if he called him. (Post–Conviction Hearing, Regan Testimony, February 20, 1989, at 23–24).

Louisiana Revised Statute 15:277 provided at the time of Kyles' trial:

> A leading question is one which suggests to the witness the answer he is to deliver, and though framed in the alternative, is inadmissible when propounded to one's own witness, unless such witness be unwilling or hostile. Louisiana Revised Statute 15:487 also provided at that time: No one can impeach his own witness, unless he has been taken by surprise by the testimony of such witness or unless the witness shows hostility toward him, and, even then, the impeachment must be limited to evidence of prior contradictory statements.

It was only after the Louisiana Supreme Court, in dicta, stated that "Wallace [Beanie]

11. Miller testified concerning why he held this belief as follows:

> It was the information that, ah, he [Johnny Burnes] knew the caliber of the weapon. He knew the location of the wound, and most importantly, he knew the fact that a television had been moved from one location to another inside the downstairs's living room of the residence. That particular information in particular was never released to anyone, because I failed to put it in the initial daily by an oversight. So that particular information was not known to any one other than someone who would have been there that night.

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was clearly a witness hostile to defendant, and defense counsel was entitled to employ leading question and to impeach the witness through any prior inconsistent statements. La.R.S. 15:277; 15:487" that Regan's decision was called into serious question.

The Louisiana court's statement does not mean that the statutory requirements would not have to have been met by Regan. Had Regan put Beanie on the stand, he would not have been able to impeach him until Regan was either surprised by the testimony or Beanie demonstrated hostility. *State v. Nuccio*, 454 So.2d 93 (La.1984); *State v. Rogers*, 324 So.2d 404 [403] (La.1975). At the time Regan was called upon to make the decision as to whether or not to call Beanie, Regan had no guarantees as to Beanie's demeanor or testimony. He made a logical decision which this court feels was justified at the time.

The possibility of the defense calling Beanie was actually considered by Regan and discussed with the prosecution. At the post-conviction hearing, prosecutor Cliff Strider in responding to the question whether Regan indicated to him whether Strider thought he would or would not call Beanie as a witness testified:

> He was debating that point. I remember that there was a discussion. I told him that I would love to get Beanie under cross-examination, and he made a remark about how that he would be able to do that, and so we'd both have him under cross-examination. There was a discussion— .... He made a remark about that Beanie would be hostile because he was going to be accusing him of the murder, and that he would be able to—I told him that I didn't think Beanie would get hostile. I didn't think that Beanie would get upset.

(Post–Conviction Hearing, Testimony of Strider, February 20, 1989, at 117.[)]

Considering the possible damage that Beanie's testimony could have wrought and considering that much of the "evidence" of Beanie's character and activities presented was based on questionable hearsay, this court believes that Regan made a tactical decision that was reasonable and well advised at the time that he decided not to place Beanie on the stand. This court must

> indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 690, 104 S.Ct. at 2065.

In addition, the essence of the state's case did not rely at all on Beanie; it was founded on the positive identification by four eye-witnesses who saw Curtis Lee Kyles at varying stages of the incident calmly placing a gun to the head of an unarmed woman, blowing her brains out (for absolutely no other reason than to rob her), and then driving away in her car. The court cannot find that the decision reached would reasonably likely have been different had Regan cross-examined Beanie.

2. Kyles alleges that counsel was ineffective because he failed to obtain the services of an eye-witness expert to prove that the identifications were suspect. At page 94 of Regan's February 20, 1989, post-conviction hearing testimony, he states that he did not know of any case in the year 1984 in which an expert in eye-witness identification was used in the Criminal District Court for Orleans Parish. In light of that testimony, it borders on frivolous to raise such a claim under the dictates of *Strickland*. Because it was not the practice of the legal community in 1984 to use these experts, and their use was, therefore, without precedent at that time, Regan cannot be found to have been ineffective by not doing that which had never before been done.

3. Likewise, Kyles' argument that Regan should have impeached Smallwood, the eye-witness who embellished his story on the stand, with his prior statement is without merit. Regan did not know of it; therefore, an ineffective assistance of counsel claim in this regard is without merit. Furthermore, since the "*Brady*" evidence was found not to be material, its non-use could not present an ineffective assistance of counsel claim.

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4. Kyles makes the broad-brush allegation that counsel's failure to interview all of the eye-witnesses constituted ineffective assistance. This claim fails to detail with particularity what prejudicial impact that failure produced, and therefore Kyles does not raise a cognizable claim.

5. Kyles claims as ineffective assistance Regan's failure to call Detective John Miller, the detective who met with Beanie, to the stand. During the post-conviction hearing, Detective Miller was called to testify. There was no testimony elicited from him that would have in any way diminished the state's case against Curtis Lee Kyles. Accordingly, no prejudice has been demonstrated by Kyles; this claim also fails.

6. The next claim is based upon counsel's alleged failure to properly argue the State's objection to Ronald Gorman's testimony as hearsay. At the trial Gorman testified that Beanie had attempted to sell Mrs. Dyes' car to Gorman. Gorman also had been convicted "on a marijuana charge" and "armed robbery that they broke it down to purse snatching." Trial Transcript at 238–39. Indeed, Gorman testified how different Beanie and Kyles appear. Trial Transcript at 244.[12]

Kyles does not specifically outline exactly what testimony Gorman would have given. He notes that "[h]owever, had trial counsel noted that a statement against penal interest is an exception to the hearsay rule, the statements made by Beanie to Ronald Gorman would have been admissible." Petitioner gives no specifics, and on that basis the court rejects this contention.

In addition, in reviewing the trial testimony and the post-conviction testimony with respect to Gorman, Gorman was a convicted felon whose testimony was and continues to be suspect. Therefore, the court cannot find that Kyles was prejudiced by Regan's "failure" in this regard.

12. Gorman was one of the individuals who went to the police after the first trial and gave a statement concerning Beanie and the Leidenheimer murder. In the statement, Gorman admitted that he had known of the Leidenheimer information for a number of months but had decided to tell the police only then because Beanie supposedly threatened to murder him if Gorman tesufied at trial.

7. Kyles raises a similar objection with regard to Johnny Burnes testimony and counsel's failure to raise an exception to the hearsay rule. The trial court stated after the post-conviction hearing:

> This Court, having had the opportunity to view Mr. Burnes on the witness stand and to hear his testimony, has chosen to totally disregard everything that he has said. Purely by coincidence, this Court has presided over the trial of Mr. Burnes, wherein he was convicted of the killing of Joseph Wallace [Beanie].

Judgment dated November 9, 1989, at 4.

The trial court's finding of fact in this regard cannot be set aside unless it is clearly erroneous. The court must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Amedeo v. Zant*, 486 U.S. 214, 223, 108 S.Ct. 1771, 1777 [100 L.Ed.2d 249] (1986). Having reviewed the entire record, this court without hesitation concurs with the trial court's determination concerning the credibility of Johnny Brown.

Burnes still denies that he killed Beanie, and testified at Kyles' post-conviction hearing that the prosecutor, Mr. Strider, whispered to Burnes outside the courtroom, "He told me whatever they had to do to get me, they was going to get me, too." (Post–Conviction Hearing, Burnes' Testimony, March 1, 1989, at 54). Even at the trial, before Beanie's murder, Burnes' testimony is uneven and unbelievable.

Based on these findings, there can be no prejudice with regard to any testimony that Burnes was precluded from giving.

8. Kyles opines that counsel failed in providing assistance when Regan did not object to the introduction of a picture and its blow-up which purportedly shows Kyles' car in the Schwegmann's parking lot at the time of the murder. It is simply yet another *ex post facto* claim which has no merit as the basis for an ineffective assistance claim. The gravamen of petitioner's argument is that the

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police record of the license plates supposedly demonstrates that Kyles' car was not in the parking lot at 9:15 p.m., the night of the murder.

As noted earlier, at the post-conviction evidentiary hearing it was established that the list did not contain the license plate numbers of every car in the lot. Furthermore, even if this list were conclusive, Regan did not even know of the list at the relevant time.

9. Petitioner continues to claim ineffective assistance by arguing that counsel's failure to object to Detective Dillman talking about two other witnesses "probably persuaded the jury that there were more witnesses who could identify the defendant." (Trial testimony at 88). This claim is totally unsupported by the record. The two other witnesses are Willie Jones and Edward Williams. These two persons participated in the photographic line-up, but were unable to make a positive identification, only a tentative one, as specifically stated by Dillman at trial. He also testified that they did not make a negative identification, that is identify someone else. Furthermore, this "failure" could not be deemed to have resulted in Kyles' receiving a fundamentally unfair trial when four eye-witnesses testified unequivocally that Kyles was the perpetrator of the crime.

10. Kyles argues that Regan was ineffectual when he failed to object during the sentencing phase to a comparison of Kyles' life while incarcerated to the Dye's family life subsequent to the murder of Mrs. Dye. This "failure" does not constitute constitutional grounds to vacate the sentence. Under the Supreme Court's ruling in *Payne v. Tennessee*, — U.S. —, [—], 111 S.Ct. 2597, 2606–08 [115 L.Ed.2d 720] (1991), it is not unconstitutional to introduce at the sentencing stage information concerning the impact on the victim's family because of the victim's death. "We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm cause by the defendant." *Id.*

11. Kyles' last contention is that counsel was ineffective for his "failure to investigate the possibility that Kyles' has organic brain damage or mental illness." First, counsel has not presented evidence that Kyles' suffering from:

> considerable inter- and intra-test scatter. Deficiencies appear in areas of perceiving and mobilizing information in the environment, academic knowledge, abstract reasoning and short-term memory

(Petition at 47) would affect his capacity to stand trial or to be sentenced as he was. Second, there is no evidence of any facts or triggering events which would have alerted Regan to the desirability of ordering such tests. Counsel testified that Kyles was lucid and perfectly capable of understanding everything that went on at trial and assisting counsel at that time. "He was certainly sane and capable of assisting me." (Post–Conviction Hearing, Testimony of Regan, February 20, 1989, at 61). Regan was privately retained counsel, working within a budget. *Id.* at 62. Taking all of this into consideration, counsel's not ordering those kinds of tests was reasonable under prevailing professional norms at the time.

C. Ineffective Assistance Following Trial

1. Kyles alleges that had Regan "kept in contact with Curtis' family during the appeal of the conviction and death sentence, he would have learned that Beanie admitted to Martina Burnes and Johnny Burnes that Beanie killed Dolores Dye." The court has already expressed its findings with respect to Johnny Burnes' testimony. The court finds Martina ("Pinky") Burnes' "new" information equally incredible. She testified at the post-conviction hearing, responding specifically to the court's question,[13] that Beanie told her before Curtis was convicted that Beanie had shot Mrs. Dye. (Post Conviction Hearing, Martina Burnes' Testimony, April 7, 1989, at 17–18). Certainly, it belies belief that had

13. As stated previously, Regan did not call her at trial because he was uncomfortable with her testimony and attitude even though the defense's version hinged on the theory that Beanie framed Kyles in order to get Pinky.

APPENDIX A—Continued

Pinky had this information at the time of trial that she would not have been forthcoming with it. Inherent in this claim also is the idea that defense counsel should continue "post-trial working" of evidence, a concept which, at the very least is novel, if not absurd. Surely, the burden of producing favorable or changed post-trial circumstances should rest with the defendant's family, not with his lawyers. They are advocates, not companions or sitters. This claim is without merit and warrants no more discussion.

2. Kyles' final assignment of error in relation to the ineffectiveness of counsel is that he "could have also called Detective Ray Miller to the stand during a hearing on a motion for new trial on the basis of newly discovered evidence"—that being Beanie's confession about being present at the scene of the Leidenheimer murder. What this evidence has to do concerning new evidence in relation to Kyles' murdering Mrs. Dye is beyond this court's independent comprehension and is neither explained nor amplified by counsel. Beanie never took the stand. Beanie's testimony and good character were not an issue. Beanie supplied a name. That is virtually all he did.

In summary, with respect to all of the ineffective assistance of counsel claims, Kyles has not demonstrated that he was prejudiced by any of these alleged "errors," nor did Regan's defense fall below the standard required. Kyles received a fair trial; a jury found him guilty beyond a reasonable doubt, did so on the basis of facts properly presented to it, and had ample evidence presented to it to do so.

IV. Other Errors in Trial Court

In addition to the foregoing, petitioner raised seventeen other "errors" which the trial court allegedly committed.

A. Kyles claims that the trial court erred when it did not appoint, without being asked, another attorney for the sentencing phase of the trial. To begin, Regan was not appointed counsel, so it is unclear why the trial court should interject itself into the business of retained counsel in that manner. Furthermore, as support for this proposition, Kyles asks the Court to look to *State v. Williams*, 480 So.2d 721, 728 n. 14 (La.1985), a case decided after this trial in which the court noted the possibility of a court appointing separate counsel for the sentencing phase of the trial. Neither statutory law nor the Louisiana Supreme Court mandate it. Furthermore, petitioner simply states in a conclusory way that this non-appointment violated Kyles' Sixth, Eighth and Fourteenth Amendment rights but does not specify how. Without specificity, the Court cannot address this allegation.

B. Kyles claims his Sixth, Eighth and Fourteenth Amendment rights were violated when his garbage was seized as the result of information given by an unreliable source. The petitioner was given a full and fair hearing based on a motion to suppress. As discussed earlier, petitioner had no reasonable expectation of privacy in the garbage; therefore, no constitutional error was committed when its contents, those being the victim's purse and belongings, were introduced at trial. Furthermore,

> where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Stone v. Powell, 428 U.S. 465, 482, 96 S.Ct. 3037, 3046 [49 L.Ed.2d 1067] (1976). This claim is without merit.

C. Kyles complains that the trial court clearly erred in precluding answers from Detective Miller regarding his knowledge about Beanie's offering the victim's car for sale and stating whether he had changed the license plate. Counsel at trial did not object to the trial court's evidentiary ruling, nor did counsel offer the justification that the testimony was admissible not for the truth of the statement, but for the proposition that the statement had been made.

This court must remember its role in reviewing the evidentiary rulings of state convicting courts. An evidentiary error in state criminal trial justifies habeas corpus relief only if the error is such that it rendered the

APPENDIX A—Continued

petitioner's trial fundamentally unfair. *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir.1984). An unfair trial is one that has been largely robbed of the dignity due a rational process. *Menzies v. Procunier*, 743 F.2d 281, 288 (5th Cir.1984). A state defendant has no constitutional right to an errorless trial. *Bailey*, 744 F.2d at 1168.

In Kyles' case in chief, the allegation that Beanie offered the car for sale after the murder was raised by Ronald Gorman (Trial Transcript at 234), and the allegation that Beanie changed the license plates was elicited on direct examination of Johnny Burnes. (Trial Transcript at 260). Thus, the jury was presented with these theories. Looking at the totality of the evidence presented and the manner it was introduced, the evidentiary rulings did not result in a fundamentally unfair trial.

D. Kyles opines that the failure of the trial court to voir dire the prospective jurors individually and privately tainted the venire when prospective jurors Gros and Miller stated that they believed the defendant was guilty. First, petitioner does not indicate that counsel ever made such a request, nor can this court locate such a request in the approximately 200–page voir dire transcript. Second, the citation of pages 92 and 93 in relation to "Gros'" testimony is not correct since the testimony of neither a Mr. nor Ms. Gros appears at those pages. Third, a review of the voir dire of Mr. Miller provides the clear view that Mr. Miller agreed that Kyles was innocent until proven guilty. Finally, there is no constitutional guarantee of individual voir dire. *See Wingo v. Blackburn*, 783 F.2d 1046, 1051–52 (5th Cir.1986); *Salemme v. Ristaino*, 587 F.2d 81, 88 (1st Cir.1978).

E. Kyles claims that his right to a fair trial and sentence were violated "by making reference to Kyles' alleged infidelity to his common law wife." Petitioner gives no specific reference where the "cheap shot" occurred; however, Kyles himself testified that he had another girlfriend. This court finds it impossible to say that Kyles was denied a fundamentally fair trial because of any such reference when it was a fact testified to by the petitioner himself. (Trial Transcript at 331).

F. Petitioner claims he did not receive a fair trial when the prosecutor argued that none of the jurors would feel safe shopping at Schwegmann's. Trial counsel made an objection and it was sustained; however counsel failed to ask that the jury be admonished to disregard the statement.

The trial court instructed the jury at the end of the guilt phase that:

> the opening statement of the District Attorney, as well as the opening statement of the defense attorney, as well as all of their closing arguments, as well as all of the questions that they have asked during this trial, as well as all of their comments during this trial, are not in any way to be considered by you as evidence in this case.

Such a prophylactic instruction cures the alleged violation. Furthermore, the failure to admonish given the circumstances of the trial still would not result in a fundamentally unfair trial.

G. Kyles next raises the identical type of objection but in regard to the sentencing phase concerning a reference to Kyles' being able to watch cable television if sentenced to life at Angola. This court has not been able to find in the record that a similar prophylactic instruction was given; however, the Louisiana Supreme Court observed that a review of the closing argument in its entirety led it to conclude that the prosecutor's improper remarks did not render the jury's sentencing recommendation unreliable. *State v. Kyles*, 513 So.2d 265, 275 (La.1987). This court concurs with the Louisiana high court's findings and will not disturb them.

H. Kyles claims that because the "sentencing paragraph of the relevant article states that the jury's decision is a 'recommendation' when in fact it is a mandatory sentence," the statute is unconstitutional, and the jury was mislead concerning the finality of their decision. This argument belies the instructions which Judge Waldron gave. In the case at bar, it is clear that the jury was apprised of the fact that its finding that Kyles should be sentenced to death would result in the imposition of that penalty. One

APPENDIX A—Continued

of the statements made to that end (and the instructions are replete with similar statements) is as follows:

> Only if you find beyond a reasonable doubt that the aggravating circumstance outweighs any one or more mitigating circumstances and you are convinced beyond a reasonable doubt that the sentence of death is appropriate, may you impose that sentence. (emphasis added).

Nowhere in the instructions, is the jury given the impression that their verdict would simply be a "recommendation." Therefore, no constitutional right was violated.

I. In the sentencing phase, a juror asked the trial court whether a life sentence without benefit of parole, probation or suspension of sentence was "exactly carried out." Kyles argues that because the judge simply reiterated what the standard of proof for the finding of a sentence of death rather than directly answering the question "was misleading and deprived Curtis of fair sentencing hearing, violating his rights...."

Under Louisiana jurisprudence, the trial court responded in a proper manner. *State v. Copeland*, 530 So.2d 526, 538 (La.1988), citing *State v. Lindsey*, 404 So.2d 466, 487 (La.1981), *after remand*, 428 So.2d 420 (La. 1983). "A discussion of future remedial measures increases the potential for arbitrary decision making by the jury and is irrelevant to the jury's duty. Thus, there is almost a blanket prohibition of these matters."

The trial court's response was not prejudicial and did not result in a fundamentally unfair trial. Indeed, if the trial court had done otherwise, it could well have committed error. The trial court adequately informed the jury of its option to sentence the petitioner to either life imprisonment or death. *Evans v. Thigpen*, 809 F.2d 239, 243 (5th Cir. 1987). As such, the court's response was not prejudicial. This claim is devoid of substance.

J. Kyles claims his constitutional rights were violated because the first degree murder statutory scheme does not allow for a separate jury to be chosen for each phase of the trial based on his contention that such a scheme "would allow jurors who are opposed to the death penalty to serve during the guilt/innocence phase, if otherwise qualified." The court finds neither statutory sanction nor constitutional justification for such a proceeding. In addition, other than offering an unsupported, if not interesting, theory of his perceptions of enhanced jurisprudential practice, petitioner does not demonstrate how the absence of such a "two jury" trial prejudiced him. The jury selection was fundamentally fair and the fact that those who do not believe in the death penalty were excluded from the guilt phase of the trial raises an issue that is wholly speculative in its nature and does not meet constitutional proportions. Furthermore, this issue was not raised in a petitioner's initial appeal and is arguably waived.

K. Kyles claims that he was deprived of a fair sentencing hearing because the prosecutor appealed in numerous ways to the passions of the jury. The Louisiana Supreme Court examined the record of the sentencing phase to determine if it was constitutionally excessive.

> In making this determination, the court considers whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the evidence supports at least one statutory aggravating circumstance; and whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the offender and the offense.

Kyles, 513 So.2d at 273. While the state supreme court recognised that the closing was surely undesirable, if not improper, in a number of ways, the court was unable to conclude that the prosecutor's improper remarks rendered the jury's sentencing recommendation unreliable. *Kyles*, 513 So.2d at 275.

This court having reviewed the record concurs with the Louisiana Supreme Court. Some of the objectionable comments refer to what have become known as "victim impact statements." In *Payne v. Tennessee*, ___ U.S. ___, [___], 111 S.Ct. 2597, 2609 [115 L.Ed.2d 720] (1991), the United States Supreme Court held that the Eighth Amend-

APPENDIX A—Continued

ment does not establish a per se bar to the introduction of victim impact evidence where the State chose to permit the admission of victim impact evidence and prosecutorial argument. This court believes that the statements made taken in the context of the whole did not render the verdict unreliable.

The jury found an aggravating circumstance which is sufficient under the Louisiana scheme to sentence Kyles to death. Based on the record in its entirety, the evidence was overwhelming of Kyles' guilt. There was little cause for doubt based on the four eyewitnesses' testimony that this defendant needlessly and with total disregard for the victim literally blew her brains out. There was little, if any, mitigating evidence. Even if the argument was inappropriate, it did not make the sentencing hearing unfair. *See Kirkpatrick v. Blackburn*, 777 F.2d 272, 283–84 (5th Cir.1985).

L. Kyles contends that the prosecution argued that the alternative to the death sentence was only "life imprisonment" not mentioning that it would be without benefit of parole, probation or suspension of sentence. This claim disregards the very explicit instructions of the trial judge at the sentencing stage, disregards the very nature of closing arguments, and would cast the prosecution in the role of an apologist, which is neither his duty nor his purpose. The claim has no merit.

M. The petitioner argues that the death penalty was arbitrarily and capriciously imposed on him because the mitigating factor of "no significant prior criminal record" was present and because "no aggravating circumstances existed other than that required to be proved in order to convict the petitioner of the a (sic) murder." Surely, the state proved that which the law required it to prove; that the jury elected to forego Kyles' wish for more merciful consideration raises no federal constitutional issue. In *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir.1986), the United States Court of Appeals for the Fifth Circuit stated:

> We fail to see why aggravating circumstances narrow the sentencing discretion any less by being made a constituent element of the crime. The State of Louisiana is entitled to authorize capital punishment for persons guilty of these aggravated acts where the jury does not find that mitigating circumstances justify less than the death penalty.

See Lowenfield v. Phelps, 817 F.2d 285, 289 (5th Cir.1987), aff'd, 484 U.S. 231, 108 S.Ct. 546 [98 L.Ed.2d 568] (1988). Petitioner raises yet another baseless claim.

N. Kyles claims that his constitutional rights were violated when two defense witnesses, Kevin Black and Johnny Burnes, were threatened by the prosecutor with being charged with accessory after the fact to first degree murder. Kyles contends that after the trial court informed them of this problem and instructed them on their Fifth Amendment right against self-incrimination, the demeanor of the two witness changed radically and their effectiveness was diminished.

This court rejects this argument as did the Louisiana Supreme Court in *Kyles*, 513 So.2d at 271. As stated before, Johnny Burnes' testimony is simply not credible under any circumstances, without any reference to his demeanor. Kevin Black testified that he saw Beanie in the Dye car between 3:15 and 3:30 p.m. on the day of the murder and that Beanie had his hair fixed in braids or plaits at the time. (Trial Testimony at 208–09). In relation to all of the other evidence and testimony adduced, these witnesses' demeanor would not have caused the outcome of this trial to be suspect. In addition the Louisiana Supreme Court found that if Beanie had provided the prosecutor "information ... indicating that Burns and Black facilitated defendant's attempts to avoid apprehension and destroy evidence, the prosecutor had a legitimate basis for considering prosecution under the accessory statute, La.R.S. 14:25 or the obstruction of justice statute, La.R.S. 14:130.-1." *Kyles*, 513 So.2d at 272 n. 6.

At the post-conviction hearing, Prosecutor Strider outlined the state's theory of the case as follows:

> Because what happened was that Curtis Kyles shot that lady, he took her car to ... Kevin Black's apartment, and there is a place where you can park an automobile that you can't see it—behind Mr. Black's apartment, you can't see it unless you're standing right there. He then got, I believe Mr. Black, to drive him over to his house. They goofed off there for a little bit. Then they got Johnny Burnes to take Black, Burnes, Kyles and Beanie back to the parking lot where the car was, and Burnes went in and picked up the car, Kyles' car. And Black and Kyles and Beanie waited ... in the other parking lot while Johnny went over and picked up the car and drove it to Black's apartment complex, where they swapped the groceries from one car to the other car.

(Post–Conviction Hearings, Strider's Testimony, February 20, 1989, at 128–29). There was reason for Strider to ask for the court's intervention. This court cannot find constitutional error in the actions of the trial court.

APPENDIX A—Continued

O. Kyles claims that his rights were violated because the pro bono attorney appointed by the Louisiana Supreme Court has no previous experience in death penalty post-conviction relief cases. The claim is without merit considering that Gerard A. Rault, Jr., who is a professor of criminal law at Loyola Law School in New Orleans, Louisiana, is listed as "of counsel" on the pleadings and participated in the post-conviction hearings. Kyles has been well represented; he received a fair trial for the tragic murder of Mrs. Dye. He asserts his innocence in the face of overwhelming evidence. No attorney, no matter such attorney's brilliance and experience, can change the facts of a case.

P. Kyles claims that his sentence of death is "invidiously discriminatory" because of Louisiana's prosecuting authorities, court, juries and governors' pattern and practice of discriminating on the basis of race, gender and poverty in the administration of capital punishment. Kyles has offered no proof that a constitutionally significant element of racial or economic bias infects the Louisiana scheme. *McCleskey v. Kemp*, 481 U.S. 279, 313, 107 S.Ct. 1756, 1778 [95 L.Ed.2d 262], *reh'g denied*, 482 U.S. 920, 107 S.Ct. 3199 [96 L.Ed.2d 686] (1987). However, even assuming that such bias is present, Kyles has offered no proof that the Louisiana legislature maintained a death penalty because of an anticipated racially or economically discriminatory effect. *Id.*, 481 U.S. at 297–98, 107 S.Ct. at 1769; *Brogdon v. Blackburn*, 790 F.2d 1164, 1170 (5th Cir.), *reh'g denied*, 793 F.2d 1287 (5th Cir.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1985 [95 L.Ed.2d 824] (1987). Accordingly, this claim is devoid of substance.

Q. Kyles claims that the cumulative effect of all these alleged "errors" resulted in the end effect "which is clearly harmful and which jointly and cumulatively deprives Curtis of his constitutional rights ..." First, this court has found that none of petitioner's claims has merit; therefore, there is no error to accumulate. "Zero times twenty is still zero." *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir.1987).

However, the Fifth Circuit has recognized cumulative error analysis in a habeas case. *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir.1991). The circuit has instructed:

> The sole dilemma for the reviewing court is whether the trial taken as a whole is fundamentally unfair. When a trial is fundamentally unfair, "there is a reasonable probability the verdict might have been different had the trial been properly conducted."

Id. (citations omitted).

This court is convinced that even if one considered all of the "errors" cumulatively, the jury's verdict would have been the same. For the sake of argument, consider that Isaac Smallwood's eyewitness testimony had been impeached, there remain three disinterested eye-witnesses who identified Kyles—regardless of hair-style—as the man they saw kill Mrs. Dye or drive away in her car. These witnesses were given the opportunity (as was the jury and the trial court) to physically compare Curtis Kyles and Beanie. If there had been a reasonable doubt as to whether Beanie and Kyles could have been confused with one another, the verdict undoubtedly would have been different. As noted before, even Kyles' own witness stated that the two individuals' builds are so different that one could not confuse the two.

APPENDIX A—Continued

The court examined all of the pictures used in the photographic line-up and compared Kyles' and Beanie's pictures; it finds that they did not resemble one another. Furthermore, the argument concerning whether the attacker had plaits, braids, a Jheri curl, or a bush is ludicrous. The photographic identifications were made using a picture of Kyles with a bush haircut. It was his face these witnesses recognized; these witnesses had been close enough to see and remember his face.

The allegedly cumulative effect of the claimed "non-errors" cannot change the clearly untainted evidence that was introduced. That evidence alone leads clearly and inevitably to the conclusion that Kyles killed Mrs. Dye in cold blood, in the course of an armed robbery. No amount of irrelevant technicalities can change that result.

Kyles got a fair trial—not simply a fundamentally fair trial, but a *clearly* fair trial.

V. Error in the Supreme Court

Petitioner argues that the Louisiana Supreme Court erroneously concluded that Beanie testified at trial which he did not. Petitioner has not demonstrated that the court's error prejudiced him, and on review of the entire trial record and post-conviction hearing, the court finds that Kyles has received treatment throughout his trial and post-conviction relief that passes constitutional muster.[14]

VI. Error in the Evidentiary Hearing

Kyles' final argument is that his right to a complete evidentiary hearing was "undermined when the trial court refused to permit Curtis, who was found to be impecunious, funds with which to hire experts and investigate by means of civil discovery." Kyles presents neither statutory authority nor constitutional mandate for such hiring of experts. But of equal importance, he offers no reason why in this instance the trial court should have provided such funds: Kyles presents no indication of what kind of experts he believed would have been helpful; the kind or nature of the evidence such experts would have produced; or what effect that "expert" evidence would have.[15] Furthermore, there was expert testimony by Mr. Dalton concerning the effectiveness of counsel claims. Ms. Hillary Murphy, who technically may not be an "expert," nevertheless presented evidence in regard to the identification of Kyles and Beanie. The fact of the matter is that the evidence was overwhelming; the court does not believe that any "expert" testimony could dissuade the court of its belief in the fairness of this trial or the propriety of the results reached by the jury.

Conclusion

Curtis Lee Kyles stands convicted of a senseless and brutal murder of an elderly woman committed during an armed robbery. He has been sentenced to death after due deliberation by a fair and impartial jury. This court in reviewing the entire record believes that he received a fundamentally fair trial and that the verdicts rendered at both the guilt phase and the sentencing phase of this trial are not suspect. Kyles has been afforded justice concomitant with that which is required under the United States Constitution, and is therefore not entitled to the relief of the Great Writ. Accordingly,

IT IS ORDERED Curtis Lee Kyles' Petition for Writ of Habeas Corpus is DENIED.

The stay of execution will be lifted by separate order.

14. The court would note, in passing, that it understands how such an error could occur. The record in this case is confusing, at best, and possibly misleading, at worst, even with careful study. While briefing was generally voluminous, it often afforded little help in unraveling, and was often the source of obfuscation, as to the procedural and factual background of Kyles' trial.

15. If indeed Kyles is again raising the argument that an eye-witness expert should have been hired, the court reiterates that such practices were not the norm at the time of Kyles' trial and the failure to fund the hiring of an expert does not rise to the level of a constitutional deprivation of Kyles' rights in this instance.

APPENDIX B

Curtis Lee KYLES

v.

John WHITLEY, Warden Louisiana State Penitentiary, Angola, Louisiana.

Civ. A. No. 90-4301.

United States District Court, E.D. Louisiana.

June 1, 1992.

ARCENEAUX, District Judge.

ORDER AND REASONS

A motion and memorandum in support of petitioner's relief from judgment pursuant to Fed.R.Civ.P. 60(b)(2) and (6) has been filed by petitioner Curtis Lee Kyles. Having reviewed the memorandum and affidavit of Darlene Kersh (who was known at the time of Kyles' trial as Darlene Cahill), the court finds that petitioner's motion to be meritless.

Ms. Kersh was one of four eye-witnesses who made a positive identification of Kyles at trial and was the only witness who had not identified Kyles in a photographic line-up. Ms. Kersh now avers that she never actually saw Kyles' face and testified untruthfully at the behest of the police and the district attorney's office. Petitioner claims that this information "undermines the entire premise of this Honorable court's conclusion that Mr. Kyles received a fair trial based upon eyewitness testimony."

This court entered judgment on petitioner's motion on March 30, 1992, and petitioner filed his notice of appeal on April 2, 1992. He now moves the court for relief based on the affidavit of Darlene Kersh.

Standard of Review

Rule 60(b)(2) and (6) provide:

On motion and upon such terms as are just, the court may relieve a party ... from a judgment, order, or proceeding for the following reasons: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); ... and (6) any other reason justifying relief from the operation of the judgment.

In this instance, with the appeal pending, this court does have jurisdiction to consider the motion and deny it on the merits without obtaining leave of the court of appeals. The United States Court of Appeals for the Fifth Circuit has held that:

> When a Rule 60(b) motion is filed while an appeal is pending, this circuit, along with other circuits and the commentators, has expressly recognized the power of the district court to consider on the merits and deny a 60(b) motion filed after a notice of appeals, because the district court's action is in furtherance of the appeal.

Willie v. Continental Oil Co., 746 F.2d 1041, 1046 (5th Cir.1984), citing *Lairsey v. Advance Abrasive Co.*, 542 F.2d 928 (5th Cir. 1955 [1976]).

The court finds that this new claim constitutes an abuse of writ which precludes the court from reviewing this claim. Petitioner has failed to provide the court with an adequate demonstration that he exercised due diligence to discover the evidence which he presents to this court as "new." While the affiant Kersh may not have had a telephone number listed as Darlene Cahill, there are other avenues using public records by which petitioner could have located this witness prior to his filing his first habeas petition. The petitioner has failed to show that he was impeded by some objective factor external to the defense such as governmental interference or the reasonable unavailability of the factual basis for the claim which prevented him from raising this claim. *McCleskey v. Zant*, [499 U.S. 467, ——], 111 S.Ct. 1454, 1473 [113 L.Ed.2d 517] (1991).

Furthermore, even if the Kersh affidavit were true, such evidence would not have affected the jury verdict in this case. Her testimony was cumulative and in the context of the entire trial transcript, rather inconsequential. Given the totality of the evidence and the remaining three eye-witnesses who chose Kyles out of a photographic line-up and who were cross-examined by Kyles' counsel during a motion to suppress, the court is not persuaded that Kyles did not receive a fun-

APPENDIX B—Continued

damentally fair trial. While Ms. Kersh's affidavit is disconcerting in that perjured testimony given at the urging of the government in such a prosecution must not be countenanced, Ms. Kersh's testimony was of little consequence in relation to the other eyewitnesses and the evidence found in Kyles' girlfriend's apartment.

Finally, under section 2254(b), a prisoner must first exhaust his state remedies prior to raising that claim in federal court. *Rose v. Lundy*, [455 U.S. 509] 102 S.Ct. 1198 [71 L.Ed.2d 379] (1982). This new "evidence" really is a new and independent basis for relief which has never been presented to the state court. As such, this court cannot grant the relief requested. Accordingly,

IT IS ORDERED that plaintiff's Rule 60 motion is DENIED.

UNITED STATES of America, Plaintiff-Appellant,

v.

Brian McKEEVER, Defendant-Appellee.

No. 92-3882.

United States Court of Appeals, Fifth Circuit.

Oct. 15, 1993.

Defendant was indicted for knowingly and intentionally manufacturing marijuana. The United States District Court, Eastern District of Louisiana, Veronica D. Wicker, J., granted defendant's motion to suppress evidence obtained during execution of search warrants. Government appealed. The Court of Appeals held that: (1) staleness did not obligate magistrate to exclude information from determination of whether probable cause supported issuance of search warrants, despite lack of specific dates of surveillance or date of alleged marijuana sales, and (2) marijuana plants located in underbrush beyond cleared area behind building were not within curtilage of building and, thus, government agents' surveillance of plants was not illegal search.

Reversed and remanded.

1. Searches and Seizures ⇐113.1

Determination of whether probable cause supports search warrants is practical, common sense decision on whether there is fair probability that contraband or evidence of crime will be found in particular place, given all circumstances set forth in affidavit. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐117

Fact that confidential informant's statements were against his own penal interests amounted to substantial corroboration of statements recited in affidavit underlying search warrants.

3. Searches and Seizures ⇐121.1

Information given to magistrate in application for search warrant must be timely and probable cause must be found to exist at time warrant issues, which requires that proof be of facts closely related in time to issuance of warrant. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐121.1

Staleness did not obligate magistrate to exclude information of on-site surveillance or confidential informant's statements from determination of whether probable cause supported issuance of search warrants for marijuana growing facility, despite lack of specific dates of surveillance or date of informant's alleged purchase of marijuana; entire scheme of purchase of land, construction of building, and set up of hydroponic facility was limited to approximately 21-month time frame. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⇐26

Fourth Amendment protects those areas in which citizens have reasonable expectation of privacy rather than providing blanket protection against searches and seizures on private property. U.S.C.A. Const.Amend. 4.

STATE OF LOUISIANA

VS.

CURTIS KYLES

CASE NO. 303-970, SECTION "F"

Consolidated with

CURTIS LEE KYLES

VS.

ROBERT HILTON BUTLER, Warden,
Louisiana State Penitentiary,
Angola, Louisiana

LOUISIANA SUPREME COURT CASE NO. 86-KA-0880

JUDGMENT

The Court denies both the defendant's Motion for New Trial and the relief sought in defendant's Writ of Habeas Corpus. In rejecting the defendant's claims in both of these proceedings, the Court makes the following observations and draws the following conclusions:

I.

Defense Counsel, Martin Regan, was not ineffective within the meaning of Strickland versus Washington, 104 S.Ct. 2052 (1984), in representing the defendant at trial. The Court finds that Mr. Regan provided the defendant with a vigorous, dedicated and more than adequate defense. As he always has been, in the many cases he has tried before this Court, Mr. Regan was a tenacious advocate on behalf of his client. His reputation as an attorney who is always prepared for, familiar with his case, and professional in his presentation remains intact despite the outcome of this particular case.

This Court appreciates Mr. Regan's self-deprecating testimony at the Motion for New Trial hearing; wherein he offered

Appendix B

the opinion that he was ineffective in his representation in this case. Despite this most humble act on the part of counsel, the Court begs to differ with him.

Much has been made of Mr. Regan's opinion that he failed miserably in his defense of Mr. Kyles when he chose not to call Joseph Wallace as a witness. Mr. Regan indicated that he incorrectly viewed the law as saying that if he called Joseph Wallace as a witness that he would have to vouch for his credibility unless he could have shown both hostility and surprise on the part of Mr. Wallace at the time Mr. Wallace testified.

This was the law of Louisiana at the time of both of Mr. Kyles' trials. At that time, the rule regarding such situations was found in La. R. S. 15:487, which provided:

> "No one can impeach his own witness, unless he have been taken by surprise by the testimony of such witness, or unless the witness show hostility toward him, and, even then, the impeachment must be limited to evidence of prior contradictory statements."

The law of Louisiana has subsequently been amended in this regard by virtue of the adoption of Article 607 of the Louisiana Code of Evidence. But at the time of Mr. Kyles' trial, under then existing law, Defense counsel certainly made an intelligent nd strategically correct decision in not placing Mr. Wallace on the stand as a defense witness.

The Court further finds that the fact that Mr. Regan never made use of an investigator in connection with this case and never consulted with a possible expert on the identification issue involved in this case is not evidence of ineffectiveness on his part. As is further noted elsewhere in this judgment, the evidence on the issue of identification was overwhelming in this case. The Court fails to see how an investigator and/or an expert could have in any way changed the outcome of the ultimate trial of this matter.

II.

The Court finds no merit to any of the Defense allegations regarding prosecutorial misconduct and alleged violation of Brady versus Maryland, 83 S.Ct. 1194 (1963).

Assuming, arguendo, that certain background information concerning and statements of Joseph Wallace were withheld by the State; the Court finds that this is not ultimately prejudicial to the Defense. The Court concludes that none of this evidence would have ultimately assisted the Defense to any significant degree in this case.

It is important to note that Joseph Wallace was never called as a witness by the State. As such, there never could be an attempt by the Defense to attack the character and credibility of Mr. Wallace.

Hence, the State never sought to vouch for the credibility of Mr. Wallace. As such, there would be no basis for the attempted impeachment of Mr. Wallace by the Defense.

It should be further noted that the Defense was given ample opportunity, and successfully placed before the jury through credible evidence, the basic premise of the Defense's case, that Joseph Wallace was in fact the killer of Mrs. Dye and that Joseph Wallace "framed" the defendant for this killing. The Defense even went so far as to present evidence as to a possible bias and motive; i.e. Wallace's desire to gain the affection of Curtis Kyles' female acquaintance--by having Kyles convicted of this crime and thereafter incarcerated.

The jury was more than adequately exposed to the possibility that Joseph Wallace was in fact the killer. They were aware that he was in fact in possession of the victim's car shortly after her murder.

The jury was likewise given the opportunity to see

Mr. Wallace in person as he was brought into open court at the behest of the State. He was made to literally stand before the jury. At the same time, the jury was afforded the opportunity to compare his height, his size, his physical characteristics to those of the defendant.

Of course, the jury ultimately rejected the defense in this case and concluded that Mr. Wallace was not in fact the killer; but that Mr. Kyles was.

III.

It should be further noted that there was testimony taken at the Post Conviction Motion hearing that involved Johnny Burnes. This Court, having had the opportunity to view Mr. Burnes on the witness stand and to hear his testimony, has chosen to totally disregard everything that he has said. Purely by coincidence, this Court has presided over the trial of Mr. Burnes, wherein he was convicted of the killing of Joseph Wallace.

IV.

In conclusion, this Court finds that the evidence against the defendant in this case is overwhelming. The following facts, proven beyond a reasonable doubt to the jury that heard this case, cannot be overlooked:

1. A series of unrelated, totally disinterested, unbiased witnesses, from every walk of life identified, without hesitation or reluctance, at two separate trials Curtis Kyles as the killer of Mrs. Dye.

2. The weapon used to kill Mrs. Dye was found behind the stove in the kitchen of the defendant's home on the weekend following the murder, within some 72 hours of the homicide.

3. Also found in the home was a collection of various pet foods. These pet foods were identified at trial as being the same brands that Mrs. Dye purchased weekly for a group of cats and dogs

that she fed on a daily basis. This link between the brands of pet food and Mrs. Dye was established by the uncontradicted testimony of her husband. The defendant took the witness stand and in the opinion of this Court perjured himself when he testified that he purchased these pet foods at Schwegmann Supermarket because they happened to be on sale. This testimony was completely contradicted by the State's rebuttal witness, the employee of Schwegmann's Supermarket; who testified that absolutely none of these items were on sale during the week of Mrs. Dye's death. Additionally, it should be noted that there was no real evidence that the defendant, at the time of his arrest, owned any cats or dogs. The police testified that they saw no evidence of any pets at the defendant's home when he was arrested. It should be noted that one bottle of pet shampoo was located during a search of the home. This, however, appeared to be of some age, and the container was at least half empty. The Court is of the opinion that this obvious lie on the part of the defendant may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire defense in this case and led to the verdict rendered.

4. As noted earlier, the jury saw Joseph Wallace in court. They were given every opportunity to observe how he clearly and distinctly did not resemble the defendant in this case.

5. More importantly, each of the witnesses was likewise afforded the opportunity in open court to observe Joseph Wallace. Each of them categorically stated that Joseph Wallace was not the killer. At the same time, each again reaffirmed their opinion that the defendant, and the defendant alone, was responsible for the death of Mrs. Dye.

6. The victim's purse and personal belongings were found in a garbage can that had been placed for collection on the curb outside of the defendant's home.

Was Joseph Wallace a killer? The Defense has portrayed him as the killer of a seaman and an elderly lady in Lakeview. This portrayal may or may not be accurate. However, this Court is convinced, as was the jury, that Joseph Wallace was not the

killer of Mrs. Dye; but that Curtis Kyles was the person responsible for the death of Mrs. Dye. The Court finds that the new evidence allegedly available, even if presented to another jury, would not in any way lead to a different outcome of this case.

New Orleans, Louisiana, this 9th day of November, 1989.

DENNIS J. BALDRON
Judge, Section "F"

ORIGINAL

Supreme Court, U.S.
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93-7927

NO. 93-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CURTIS LEE KYLES

Petitioner,

v.

JOHN P. WHITLEY, Warden
Louisiana State Penitentiary,
Angola, Louisiana,

Respondent.

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REC'D
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SUP

MOTION TO FILE IN FORMA PAUPERIS WITHOUT PAYMENT OF FEES

NOW INTO COURT, through undersigned counsel, comes Curtis Lee Kyles, Petitioner, and moves the Court to permit him to file in Forma Pauperis, and attaches, pursuant to Rule 39, copy of Voucher No. 0529647 entitled Appointment of and Authority to Pay Court Appointed Counsel signed by Judge Carolyn D. King of

9

the Court of Appeals for the Fifth Circuit, dated 4/2/92, appointing George W. Healy, III counsel for Petitioner.

Respectfully submitted,

GEORGE W. HEALY, III (6711)
400 Poydras Street
Texaco Center - 30th Floor
New Orleans, LA 70130-3245
Telephone: (504) 566-1311

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10 day of February, 1994 served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid to Harry A. Connick, District Attorney of New Orleans, State of Louisiana, 619 South White Street, New Orleans, Louisiana 70119 and Jack Peebles, Assistant District Attorney of New Orleans, State of Louisiana, 619 South White Street, New Orleans, Louisiana 70119.

RECEIVED
FEB 17 1994
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SUPREME COURT, U.S.

CJA 20 (Rev. ...80) **APPOINTMENT OF ( )D AUTHORITY TO PAY COURT APPOINTED COUNSEL**

1. JURISDICTION	2. MAG. DOCKET NO.	3. DIST. CT. DOCKET NO.	VOUCHER NO.
1 ☐ MAG. 2 ☐ DIST. 3 ☒ APPEALS 4 ☐ OTHER		CA-90-4301-K	0529847

4. APPEALS DOCKET NO.	5. FOR (DISTRICT/CIRCUIT)	6. LOC. CODE	7. CHARGE/OFFENSE (U.S. or other code citation)	7A. CASE CODE
92-3310	Fifth Circuit	LAUNO	28:2254	CA

8. IN THE CASE OF	9. PERSON REPRESENTED (FULL NAME)	9A. NO. REPRES.
KYLES vs WHITLEY	CURTIS LEE KYLES	

10. PERSON REPRESENTED (STATUS)
1 ☐ DEFENDANT–ADULT 3 ☒ APPELLANT 5 ☐ OTHER
2 ☐ DEFENDANT–JUVENILE 4 ☐ APPELLEE

11. PROCEEDINGS (Describe briefly)
APPEAL

U.S. COURT OF APPEALS
FILED
MAY 0 4 1993
RICHARD E. WINDHORST, JR.
CLERK

12. PAYMENT CATEGORY
A ☐ FELONY C ☐ PETTY OFFENSE E ☐ OTHER
B ☐ MISDEMEANOR D ☒ APPEAL

13. COURT ORDER
O ☒ Appointing Counsel F ☐ Subs. for FD
C ☐ Co-Counsel R ☐ Subs. for Retained Atty.
P ☐ Subs. for Panel Atty. _____ Name of prior panel attorney
Appt. Date _____ Voucher No. _____

Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in item 14 is appointed to represent this person in this case.

▶ Carolyn D King
Sig. of Presiding Judicial Officer or By Order of Court (Clerk/Deputy)

▶ _____ Date of Order ▶ 4/2/92 Nunc Pro Tunc Date

14. FULL NAME OF ATTORNEY/PAYEE (First Name, M.I., Last Name, Including Suffix) AND MAILING ADDRESS
George W. Healy, III
400 Poydras St., 27th Fl.
New Orleans, LA 70130

15. WORK PHONE: (504) 566-1311

16A. Does the attorney have the preexisting agreement (see instructions) with a corporation, including a professional corporation? ☐ Yes ☐ No

16B. SOCIAL SECURITY NO. (Only provide per instructions)

16C. EMPLOYER I.D. NO. (Only provide per instructions)

16D. NAME AND MAILING ADDRESS OF LAW FIRM (Only provide per instructions)

CLAIM FOR SERVICES OR EXPENSES

	SERVICE	HOURS	DATES
17. IN COURT	a. Arraignment and/or Plea		
	b. Bail and Detention Hearings		
	c. Motions Hearings		
	d. Trial		
	e. Sentence Hearings		
	f. Revocation Hearings		
	g. Appeals Court		
	h. Other (Specify on additional sheets)		
	(Rate per hour = ,) TOTAL HOURS =		
18. OUT OF COURT	a. Interviews and conferences		
	b. Obtaining and reviewing records		
	c. Legal research and brief writing		
	d. Travel time (Specify on additional sheets)		
	e. Investigative and other work (Specify on additional sheets)		
	(Rate per hour =) TOTAL HOURS =		

Multiply rate per hour times total hours to obtain "In Court" compensation. Enter total below.
17A. TOTAL IN COURT COMP. $

Multiply rate per hour times total hours. Enter total "out of court" compensation below.
18A. TOTAL OUT OF COURT COMP. $

19. EXPENSES	TRAVEL, LODGING, MEALS ETC.	AMOUNT	OTHER EXPENSES	AMOUNT

19A. TOTAL TRAVEL EXP. $
19B. TOTAL OTHER EXP. $
20. GRAND TOTAL CLAIMED $

21. CERTIFICATION OF ATTORNEY/PAYEE FOR PERIOD _____ TO _____
F ☐ Final Payment I ☐ Interim Payment No. _____ Has compensation and/or reimbursement for work in this case previously been applied for? ☐ YES ☐ NO
If yes, were you paid? ☐ YES ☐ NO If yes, by whom were you paid? _____ How much? _____ Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? ☐ YES ☐ No
If yes, give details on additional sheets. _____
I swear or affirm the truth or correctness of the above statements ▶ _____ SIGNATURE OF ATTORNEY/PAYEE ▶ _____ DATE

APPROVED FOR PAYMENT

22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSE	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED/CERT
$	$	$	$	$

27. SIGNATURE OF PRESIDING JUDICIAL OFFICER — DATE — 27A. JUDGE/MAG. CODE

28. SIGNATURE OF CHIEF JUDGE, CT. OF APPEALS (OR DELEGATE) — DATE — 29. TOTAL AMT. APPROVED $

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93-7927 ORIGINAL

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10th day of February, 1994 served a copy of the foregoing pleading by mailing the same by United States mail, properly addressed, and first class postage prepaid to Harry A. Connick, District Attorney of New Orleans, State of Louisiana, 619 South White Street, New Orleans, Louisiana 70119 and Jack Peebles, Assistant District Attorney of New Orleans, State of Louisiana, 619 South White Street, New Orleans, Louisiana 70119.

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Supreme Court, U.S.
FILED
MAR 15 1994
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NO. 93-7927

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CURTIS LEE KYLES
Petitioner

Versus

JOHN P. WHITLEY, Warden
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF JOHN P. WHITLEY, RESPONDENT

HARRY F. CONNICK
DISTRICT ATTORNEY
OF ORLEANS PARISH

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NO. 93-7927

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CURTIS LEE KYLES,
Petitioner

Versus

JOHN P. WHITLEY, Warden,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF JOHN P. WHITLEY, RESPONDENT

May It Please the Court:

Respondent John P. Whitley, Warden of the Louisiana State Penitentiary at Angola, Louisiana (hereinafter, "the State") opposes the grant of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, for the following reasons:

STATEMENT OF THE ISSUE

Whether the United States Court of Appeals for the Fifth Circuit committed clear error in determining that petitioner Curtis

Kyles received a fundamentally fair trial in the face of Kyles' allegations that the prosecution withheld exculpatory evidence, engaged in prosecutorial misconduct, and provided him with ineffective representation.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in Court Below:

Petitioner Curtis Lee Kyles was convicted in the Criminal District Court for the Parish of Orleans, Louisiana, of the First Degree Murder of Dolores Dye on September 20, 1984. The crime occurred during an armed robbery in the parking lot of a large grocery store in New Orleans, Louisiana. Trial was held in the Criminal District Court on December 6 and 7, 1984. The jury returned a verdict of guilty and recommended a death sentence.

Kyles appealed to the Louisiana Supreme Court, which affirmed the conviction and sentence, State v. Kyles, 513 So.2d 265 (La. 1987), cert. denied 486 U.S. 1027, 108 S.Ct. 20005, 100 L.Ed. 2d 236, reh. denied 487 U.S. 1246, 109 S.Ct. 4, 101 L.Ed. 2d 955 (1988).

Kyles applied for post-conviction relief in the Criminal District Court for the Parish of Orleans on January 2, 1989. That court then conducted an extensive evidentiary hearing on petitioner's application for post-conviction relief, and on

November 9, 1989 rendered a written opinion denying petitioner's application. The state trial judge stated his essential findings of fact in his written opinion. Kyles' application for review in the Louisiana Supreme Court was denied.

On October 28, 1990, Appellant Kyles filed a petition in the United States District Court for the Eastern District of Louisiana for relief under 28 U.S.C. 2254 (Writ of Habeas Corpus by a Person in State Custody). Without holding an evidentiary hearing, and based upon evidence presented in state post-conviction hearings, the United States District Court denied the petition. Kyles v. Whitley, 5 Fed. 3rd 844 (1992). Kyles appealed this decision to the United States Court of Appeals, which affirmed the denial of relief. Kyles v. Whitley, 5 Fed. 3rd 806 (5th Cir. 1993). Petitioner now seeks review of the decision of the Court of Appeals.

(ii) Statement of Facts

The facts established at the trial of this case are provided in detail in the opinion of the Louisiana Supreme Court affirming Kyles' conviction, **State v. Kyles**, 513 So.2d 265 (La. 1987), and in both the United States District Court decision and the decision of the United States Court of Appeals, supra.

Essentially, the state produced four eyewitnesses at Kyles' trial who testified that they saw Curtis Kyles put a gun to the

head of the victim, Dolores Dye, and shoot her. They saw this homicide occur in the bright afternoon light of a Schwegmann Brothers' Giant Supermarkets parking lot in New Orleans. They then saw Kyles get into Mrs. Dye's car and drive slowly from the parking lot. **State v. Kyles**, 513 So.2d at 267, 268.

In addition to the eyewitnesses' testimony, the state presented evidence at trial that (1) the gun used to kill Mrs. Dye was found behind a stove in the kitchen of the defendant's home within 72 hours of the homicide; (2) a sales slip found in Mrs. Dye's vehicle after the homicide bore the defendant's fingerprints; (3) Mrs. Dye's purse and personal belongings were found in a garbage can that had been placed for collection on the curb outside the defendant's home; and (4) a collection of pet foods similar to those habitually purchased by Mrs. Dye was found in the defendant's house after the homicide.

The defense at the trial was that one Joseph Wallace, called "Beanie," was the actual perpetrator, and that he had set up Curtis Kyles. This defense was fully explored during the trial, although the defense chose not to call "Beanie" Wallace as a witness at the trial. The state also did not call him, but on rebuttal the state had him brought back into the courtroom so that "Beanie" and the defendant, Curtis Kyles, could be compared by each of the jurors and also once again by each of the four eyewitnesses who had testified that they saw Kyles shoot Mrs. Dye. After viewing the two together, each eyewitness stated that, beyond a reasonable

doubt, Curtis Kyles was the perpetrator, and "Beanie" Wallace was not the perpetrator.

ARGUMENT

Reasons Why the Writ Should Not be Granted:

1. The legal questions presented by petitioner ultimately rest on factual findings made adversely to the petitioner.

Petitioner Kyles argues that his conviction and sentence of death "resulted from the failure of the State to provide to his trial counsel, upon request, and upon becoming aware of false testimony, significant, material, exculpatory evidence, and because his trial counsel failed to call as a witness Joseph Wallace a/k/a Beanie, the informant who led police to suspect Kyles, notwithstanding that he earnestly wanted to call Beanie as a witness." Petition, p. 11.

Each of the factual allegations made by petitioner has been considered by the state trial court in post-conviction proceedings, and by the United States District Court and the United States Court of Appeals for the Fifth Circuit in subsequent federal proceedings. All of these courts made findings of fact which either denied the truth of the allegations made by petitioner or determined that such facts, in the context of this case, did not deprive petitioner of a fundamentally fair trial. As the Fifth Circuit stated: "We are

not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense. Rather, the jury rejected his defensive theory and viewed the overwhelming incriminating evidence as proof of Kyles' guilt." Kyles v. Whitley, 5 F.3rd at 820.

This Court does not traditionally sit to review alleged factual errors. See, e.g., United States v. Johnson, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 44 S.Ct. 164 (1924) (dismissing the writ upon discovering that the dispute involved a question of fact rather than law); Houston Oil Co. v. Goodrich, 245 U.S. 440, 38 S.Ct. 140 (1918) (same).

This Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. See: e.g., Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 318 n.5, 105 S.Ct. 725, 729 n. 5 (1985); United States v. Doe, 465 U.S. 605, 614, 104 S.Ct. 1237, 1243 (1984); United States v. Reliable Transfer Co., 421 U.S. 397, 401 n. 2, 95 S.Ct. 1708, 1711 n. 2 (1975).

2. This case is not now appropriate for review because issues pertinent to the case remain unexhausted in the state judicial system. As petitioner has pointed out in his statement of jurisdiction: "There is presently under consideration in the Louisiana State Court system an unexhausted claim concerning recantation by one of the alleged eyewitnesses to the murder of

which Kyles was convicted. Another evidentiary hearing will be scheduled within the next few weeks, as ordered by the Supreme Court of Louisiana." (Petition, p. 2) This claim by defendant has been described by the United States District Court. Kyles v. Whitley, 5 F.3rd 862 (1992).[1] Petitioner has not exhausted his remedies in the state judicial system. Until petitioner exhausts his remedies in the state system, review by the federal system is premature. Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982).

This Court's usual practice is to await final judgment in the lower courts before exercising certiorari jurisdiction. See: e.g., Virginia Military Institute v. United States, 113 S.Ct. 2431 (1993) (opinion of Scalia, J.); Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328, 88 S.Ct. 437, 438 (1967)(per curiam). It would be inappropriate for this Court to review defendant's conviction at this time because of the continuing litigation in state court.

[1]Petitioner sought relief from judgment pursuant to Fed.R.Civ.P. 60(b)(2) and (6), and the Fifth Circuit held that petitioner had no action under that rule. The Court of Appeals affirmed the judgment but vacated the District Court's opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK PEEBLES
ASSISTANT DISTRICT ATTORNEY
619 South White Street
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

CERTIFICATE OF SERVICE

I hereby certify that I have on this 15th day of March, 1994 served a copy of the foregoing pleading on the attorney for petitioner herein by mailing a copy of same to:

Mr. George W. Healy, III
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New Orleans, Louisiana

JACK PEEBLES
ASSISTANT DISTRICT ATTORNEY

Supreme Court, U.S.
FILED
JUN 10 1994
OFFICE OF THE CLERK

No. 93-7927

In The

Supreme Court of the United States

October Term, 1993

CURTIS LEE KYLES,

Petitioner,

versus

JOHN P. WHITLEY, WARDEN

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed February 10, 1994
Certiorari Granted April 25, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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Opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's Judgment denying the writ of habeas corpus, No. 92-3310, October 14, 1993

Supreme Court of Louisiana.

STATE of Louisiana

v.

Curtis L. KYLES.

No. 86-KA-0880.

Sept. 9, 1987.

Concurring Opinion Sept. 11, 1987.

Rehearing Granted in Part;
Denied in Part Oct. 15, 1987.

LEMMON, Justice.

This is an appeal from a conviction of first degree murder and a sentence of death. The principal issues on appeal involve (1) the trial court's refusal to suppress evidence seized in and around defendant's home; (2) the prosecutor's intimidation of defense witnesses by notifying the court that the witnesses may be charged as accessories after the fact to the murder and requesting that they be advised of their rights against self-incrimination; (3) the trial judge's curtailing of defense counsel's closing argument, and (4) the prosecutor's improper comments in closing arguments in both the guilt and the penalty phase.[1]

After considering every assignment of error, including those abandoned or not argued on appeal, and after

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[1] Defendant's other assignments of error involve only settled principles of law and are treated in an unpublished appendix, which is attached to this opinion and is part of the official record.

making an independent review of the record, we affirm the conviction and sentence.

Facts

The mid-afternoon armed robbery and murder of a sixty-year old woman in the parking lot of Schwegmann Brothers' Supermarket was witnessed by four persons. The witnesses saw a black man accost the woman as she placed her groceries in the trunk of a red Ford LTD. The victim threw her purse into the trunk, slammed the lid, and tried to get away. The assailant chased her and wrestled her to the ground. When she attempted to escape again, the robber grabbed her arm, drew a revolver from his waistband, and fired it into her left temple, killing her instantly. The gunman then took her keys from her hand, got into her car, and drove slowly from the parking lot.

Two days later, Joseph "Beanie" Wallace informed police investigators he had purchased a red Ford LTD the previous day from defendant. The police determined that the car was registered in the victim's name.

Defendant was arrested outside his home a few days later. Police recovered a .32 revolver, which was later determined to be the murder weapon, behind the stove in his kitchen. In a kitchen cabinet, the police found groceries in Schwegmann's bags, including brands of dog and cat food normally purchased by the victim. A search of several garbage bags located at curbside in front of defendant's home turned up the victim's purse, driver's license [sic] and other personal items.

Partial fingerprints were found on the victim's effects, but none was sufficient for a positive identification. No fingerprints were found on the .32 revolver or in the LTD, although defendant's prints were recovered from a Schwegmann's cash register receipt found on the floor of the car. However, the chemical process used to raise the fingerprints on the register receipt destroyed the inked printing on the paper, thus making it impossible to determine what the receipt was for or when the purchase was made.

Three of the eyewitnesses to the murder picked out defendant in photographic lineups. The witnesses also positively identified defendant at trial as the murderer.

The defense was that the eyewitnesses to the crime were mistaken in their identification of defendant. The defense presented several witnesses who saw Joseph "Beanie" Wallace in a red car similar to the victim's about an hour after the killing. Other witnesses testified that Wallace had attempted to sell the car shortly after the murder. One witness observed Wallace stooping down near the stove in defendant's home the day before the gun was found behind the stove by the police. There was further testimony that Wallace and defendant resembled each other. Additionally, the defense presented testimony that Wallace was very romantically interested in Martina "Pinky" Burns, defendant's long-time girlfriend and the mother of defendant's four children. Finally, defendant took the stand and testified without contradiction that he had no prior convictions. Denying any involvement in the shooting, he explained his fingerprints on the cash register receipt by asserting that Wallace had picked him up in a red car the day after the murder and had taken him to

Schwegmann's, where he purchased transmission fluid for his car and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the package of cigarettes. Elsewhere, there was testimony that defendant's family kept a dog and cat and often fed stray animals in the neighborhood.

On rebuttal, the prosecutor had Wallace brought into the courtroom. Each of the eyewitnesses, after viewing Wallace standing next to defendant, reaffirmed previous identifications of defendant as the murderer.

The jury unanimously found defendant guilty of first degree murder.[2]

In the sentencing phase, the prosecutor reintroduced the evidence adduced in the guilt phase and rested without calling any further witness. The defense called two of defendant's sisters and two of his brothers, who testified that defendant had a close relationship with his children and loved and supported them. Defendant also took the stand and continued to assert his innocence.

The jury unanimously recommended the death penalty, finding as the sole statutory aggravating circumstance that the killing occurred during the commission of an armed robbery. La.C.Cr.P. art. 905.4(a). Hence this appeal.

Sufficiency of the Evidence (Assignment No. 50)

Defendant was positively identified as the murderer by eyewitnesses to the crime, and the murder weapon

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[2] An earlier trial ended in a mistrial when the jury was hopelessly deadlocked after almost four hours of deliberation.

and personal items belonging to the victim were found in and around defendant's home shortly after the crime. Wallace's testimony (apparently credited by the jury) established that defendant sold the victim's car the day after the murder, and a receipt with defendant's fingerprints was found in the car. Although defendant points out that the eyewitness identification was based on fleeting glimpses from poor angles and that the other evidence was explained away by his witnesses, the evidence, viewed in the light most favorable to the prosecution, was clearly sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of first degree murder.[3] *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Denial of Motion to Suppress Evidence (Assignments Nos. 2 and 8)

Defendant moved to suppress the victim's purse, driver's license and other personal effects seized without a warrant from plastic garbage bags in front of defendant's home four days after the murder. He also moved to suppress the murder weapon seized inside his home eleven hours after the first seizure.

In the first seizure between 1:00 and 3:00 a.m., the police took possession of five green garbage bags that

[3] Although counsel lists sufficiency of the evidence as an assignment of error, he did not truly contest the sufficiency under the *Jackson* standard. Rather, defense counsel pointed out that the evidence was not overwhelming in order to avoid a harmless error determination if other assignments of error otherwise warranted reversal of the conviction.

had been placed in front of defendant's home in the area between the sidewalk and the street curb. An officer testified that there were several holes in the bags from which trash and debris had fallen and that the bags contained leftover food and household garbage. The trial court denied the motion to suppress, ruling that the plastic bags were ordinary garbage which had been abandoned when put out for collection.

Defendant argues that since there was no evidence garbage was to be collected on the day of the seizure, there was no showing of abandonment, and he therefore retained a reasonable expectation of privacy with respect to the bags.

The bags were prepared for collection in the normal manner of handling garbage and were placed in the usual location for regular collection. Thus, the issue is whether the placing of these garbage bags for collection constituted abandonment.[4]

When property has been abandoned, a person's property interest in it lapses, and there is no further reasonable expectation of privacy. As a consequence, the property may be searched and seized without the normally required warrant. See *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L. Ed.2d 668 (1960), upholding a warrantless search of a wastepaper basked in a hotel room, after the lodger had paid the bill and vacated the

[4] The police had obtained a warrant to search the "premises" at 2313 Desire Street at least six hours prior to the seizure of the plastic bags. We need not decide, however, whether the warrant covered this property.

premises, because the seized items had been abandoned; *State v. Mattheson*, 407 So.2d 1150 (La. 1982), upholding the seizure of items from the garbage can in the restroom of a restaurant as abandoned property.

Federal courts have uniformly held that placing trash in containers outside the home for collection constitutes abandonment. See *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir.1986), upholding a warrantless search of trash containers at curbside; *United States v. Sumpter*, 669 F.2d 1215 (8th Cir.1982), upholding retrieval by agents from a garbage truck of defendant's trash and indicating that any legitimate expectation of privacy is lost once trash is put out for collection in the usual manner; *United States v. Reicherter*, 647 F.2d 397 (3rd Cir.1981), upholding the seizure of evidence from defendant's trash when police posed as regular trash collectors; and *United States v. Shelby*, 573 F.2d 971 (7th Cir.1978), in which the court stated that the placing of trash in garbage cans at a time and place for anticipated collection signifies abandonment.

We likewise conclude in this case that the depositing of items in a garbage bag which is placed in the usual location for collection constitutes abandonment of the items and termination of any expectation of privacy by the owner of the property.

The second seizure, involving the murder weapon (along with another weapon and ammunition), occurred during a search of defendant's home pursuant to a warrant. Defendant contends that the items should have been suppressed because there was an inadequate description in the warrant of the place to be searched and there was

no showing in the affidavit that either the informant or his information was reliable.

The purpose of the particularity requirement in warrants is to prevent a search of the wrong premises and thus to insure a person's freedom from unwarranted police intrusion. When the place to be search is described in sufficient detail so that it is reasonably probable that the wrong place will not be searched, the description is sufficient. *State v. Scramuzza*, 408 So.2d 1316 (La.1982).

The application for the search warrant in this case described the place to be searched as a "two (2) story Brown woodframe house, with white trim and surrounding curtilage". Although the application listed "2313" with no street name as the municipal number, the body of the affidavit gave the full address of "2313 Desire St.", and the warrant itself authorized a search of the premises at "2313 Desire St., New Orleans". Neither the affidavit nor the warrant, however, indicated that there was more than one apartment at that address. Nevertheless, Wallace had pointed out where defendant lived, and a surveillance of that building was subsequently conducted. The police delayed acting until defendant exited from one of the apartments, thus signaling in unmistakeable fashion which apartment was his. Only at this point was defendant arrested and his apartment searched. Under these circumstances, there was little probability that the wrong place would be searched, and there was no violation of the particularity requirement.

As to the reliability of the informant and the information, Joseph "Beanie" Wallace furnished the information which led to the search. Wallace contacted homicide

detectives two days after the murder and stated that on the previous day defendant had offered to sell him a red Ford LTD for $400. According to Wallace, who had known defendant for a number of years, he agreed to the purchase, even though defendant claimed he had misplaced the registration papers. At the time of the sale of the car, defendant was carrying a .32 pistol. After the sale, Wallace helped defendant unload several bags of groceries, still in Schwegmann's bags, from the trunk of the LTD, where he also noticed a woman's purse. Later that same day, defendant called Wallace and asked for a ride to Schwegmann's to pick up his own car which reportedly had broken down in the parking lot. When they arrived at the parking lot, defendant started the car right up and drove away. Wallace also directed the police to the LTD and pointed out defendant's home.

Before seeking the warrant, the police determined that the car belonged to the victim. They also determined that defendant, along with his girlfriend and their children, lived at the address pointed out by Wallace.

At 8:00 a.m. on the morning after the warrant was issued, the police began a surveillance at the address. When defendant left his home at 10:40, the police moved in and arrested him. The police then searched the home and located the murder weapon behind the stove in defendant's kitchen.

Defendant contends first that there was nothing in the affidavit to show that Wallace or his information was reliable. He points out that Wallace had never supplied information to police before this event and also that

Wallace had a previous conviction as an accessory after the fact to murder.

A search or seizure may only be made pursuant to a warrant issued upon probable cause supported by a affidavit of a credible person. U.S. Const. amend. IV; La. Const. art. I, § 5; La.C.Cr.P. art. 162. The function of the judicial officer in determining the existence of probable cause is to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

The affidavit in this case recites that defendant sold a 1977 Ford LTD to the informant the day after the murder; that defendant unloaded groceries in Schwegmann's bags and a woman's purse from the trunk of the car; that defendant at the time of the sale possessed a weapon of the same caliber as the murder weapon; that the informant soon learned that the car was the one which had been stolen during the robbery and murder; that the informant picked out a photograph of defendant; that the physical description of defendant matched that given by eyewitnesses to the murder; and that the person named by the informant resided at 2313 Desire. While the judicial officer was not furnished the informant's name nor told of his prior record (a fact arguably not proved in the record), the affidavit did recite that the informant had given a signed statement. Further, even if the informant had a criminal record, that fact alone would not rebut the presumption of inherent credibility attaching to citizen

informants. *State v. Morris*, 444 So.2d 1200 (La.1984); *State v. Lehnen*, 403 So.2d 683 (La.1981).

Consequently, a fair reading of the affidavit indicates the judicial officer was presented with ample specific facts upon which to base an independent decision that there was probable cause to issue the warrant. La.C.Cr.P. art. 162; *State v. Brannon*, 414 So.2d 335 (La.1982). The totality of the circumstances set forth in the affidavit supported a practical, commonsense conclusion that there was a "fair probability" that evidence of the crime would be found in defendant's home and that the judicial officer had a substantial basis for deciding that probable cause existed. *Illinois v. Gates, supra*. There was no error in the issuance of the warrant.

Intimidation of Defense Witnesses (Assignment No. 10)

Defendant complains the prosecutor intimidated defense witnesses by notifying the court that the witnesses may be charged as accessories after the fact to the murder and by requesting the court to advise them of their right not to incriminate themselves.

Shortly before the defense began to present its case-in-chief, the trial judge informed defense counsel, outside the presence of the jury, that the prosecutor had notified him that certain defense witnesses might be charged as accessories after the fact to first degree murder and had requested him to advise Johnny Burns and Kevin Black of their right to refuse to testify. The judge indicated that he would allow the defense to use the testimony of the witnesses from defendant's previous trial if either declined to testify. During the ensuing discussion, the

prosecutor clarified that he was only considering the possibility and that he did not have any present intention of filing charges against either man.

Overruling defense objections that this was a scare tactic, the judge brought the witnesses into court, appointed an attorney to consult with them, and then advised them as to their privilege against self-incrimination. He cautioned the witnesses that they had the right to refuse to answer any questions if they felt the answer might in any possible way incriminate them. The judge also emphasized that the mere fact of testifying would not automatically result in charges being filed against them. Each witness acknowledged his understanding of the advisement and stated his willingness to testify.[5]

Defendant argues that the prosecutor's request to have the witnesses advised of their rights was a ploy designed to discourage the witnesses from testifying after their earlier testimony had caused a deadlocked jury. Defendant claims the tactic resulted in the witnesses' being visibly nervous and less effective, thereby denying him a fair trial.

Significantly, defendant does not claim either witness altered his testimony in any way as a result of the advise.

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[5] Black's testimony placed Wallace in a red car between 3:15 and 3:30 p.m. on the afternoon of the murder. Burns, the brother of Martina Burns (defendant's girlfriend and the mother of his children), stated he had also seen Wallace in a red car, and he further testified that he had seen Wallace stooping down near defendant's stove on the Sunday after the murder. Burns added that Wallace routinely carried a gun and that he had seen Wallace in possession of .25, .32 and .357 caliber weapons.

Moreover, the record provides arguable support that the state had a reasonable basis for considering charging Burns and Black with criminal violations.[6]

In any event, defendant cannot point to any evident prejudice, since both witnesses (even if frightened) testified very favorably to him and steadfastly disputed inuendoes [sic] that they participated in the crime, albeit on an after-the-fact basis. The request for advisement to defense witnesses of their constitutional rights to decline to give answers which may incriminate them does not appear to constitute intimidation which so adversely affected any of defendant's substantial rights as to require reversal of the conviction.

Curtailment of Closing Argument (Assignment No. 23)

During closing argument in the guilt phase of the trial, defense counsel asked the panel to consider why the prosecutor had not called Joseph "Beanie" Wallace to the stand. He continued:

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[6] The prosecutor questioned each witness in great detail about their being with defendant and Wallace within an hour of the shooting, helping unload the victim's car, and providing transportation to defendant for the return trip to Schwegmann's to pick up his own car. If Wallace provided information to the prosecutor indicating Burns and Black facilitated defendant's attempts to avoid apprehension and destroy evidence, the prosecutor had a legitimate basis for considering prosecution under the accessory statute, La.R.S. 14:25, or the obstruction of justice statute, La.R.S. 14:130.1. Under these circumstances, the prosecutor arguably acted properly in notifying the court and in requesting that the witnesses be advised of their constitutional right not to incriminate themselves.

"Where is Mr. Beanie to come take the stand and tell you that he didn't change the [license] plate [on the victim's car]? Think about it, please. Could they not have put him on the stand, in accordance with their duty to put on all evidence to support their case. Did they do that? They didn't. Why Not? Why not? Has Mr. Beanie been involved in a murder? Does he have a conviction for murder or involved in a murder before?"

The prosecutor objected that this argument went beyond the scope of evidence presented at trial. The trial court sustained the objection and gave the requested admonition to disregard the argument.

Defense counsel contends that the central issue before the jury was the prosecutor's failure to rebut the defense's "damaging evidence" which tended to show Wallace had committed the murder. Noting that the defense was prevented from cross-examining Wallace by the prosecutor's failure to call Wallace as a state witness, counsel argues that Wallace's absence from the witness stand was a legitimate topic for closing argument and that the trial court's curtailment of his exploitation of that weakness in the case was a denial of due process which deprived him of a fair trial.

Counsel's speculation in argument that the prosecutor's reason for not calling Wallace as a witness was that Wallace had a prior conviction for murder clearly went beyond the record. The only evidence on this point was a police mug shot of Wallace and the statement by defendant, when questioned about Wallace's motivation to "frame" him, that Wallace "had been down for murder once and he don't need to be down no more". Thus, the

trial judge correctly sustained the prosecutor's objection to the comment about Wallace's prior conviction for murder.

Moreover, Wallace had been subpoenaed by the defense, who could have called and cross-examined him about his version of the events that was contradicted by the defense witnesses. Wallace was clearly a witness hostile to defendant, and defense counsel was entitled to employ leading questions and to impeach the witness through any prior inconsistent statements. La.R.S. 15:277; R.S. 15:487.

Improper Argument by Prosecutor (Assignment No. 24)

In rebutting defense counsel's argument during the guilt phase of the trial, the prosecutor picked up the subject of Joseph "Beanie" Wallace and told the jurors that Wallace had been outside and available for the defense to call as a witness. Defense counsel objected, disputing Wallace's availability. He also objected to the inference that the defense was under a duty to produce any evidence or to call any witnesses. The trial court overruled both objections.

Continuing with his remarks, the prosecutor said:

> "I agree [with defense counsel]. The defendant has no burden to call anyone, but I want you to remember who's saying 'I couldn't talk to Beanie. I couldn't examine him.' Who's saying that? [Defense counsel] is. You saw Beanie here. If he wants to call him, all he has to do is stand up and say, 'I call Joseph Wallace to the stand. I've got some questions I want to ask him.' "

The judge then overruled another objection that the defense had no burden to call anyone, noting that he would instruct the jury on the subject at the proper time.

Defendant argues that the prosecutor's argument was misleading (1) because it did not explain to jurors that the defense could not call or impeach Wallace and (2) because it implied the defense had a duty to adduce testimony from the witness.

As noted earlier, defendant could have called Wallace to the stand and could have asked leading questions or impeached him upon a showing of the witness' hostility (which was very apparent). La.R.S. 15:487. Defendant's argument that he would have been required to show both hostility *and* surprise is clearly wrong.

As to the second contention, the defense bears no duty to call any witnesses or to produce any evidence. However, the prosecutor did not assert or imply that the defense had a burden to call Wallace. In fact, the prosecutor agreed that the defense had no such burden, and he merely pointed out that Wallace was available to be called by either party. This statement was a proper rebuttal to defendant's argument that the prosecutor's failure to call Wallace deprived him of an opportunity for cross-examination. Moreover, the judge properly instructed the jury that the defense had no burden to call any witnesses or to present any evidence.

Capital Sentence Review

Pursuant to La.C.Cr.P. art. 905.9, this court reviews every sentence of death in the state to determine if it was

constitutionally excessive. In making this determination, the court considers whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the evidence supports at least one statutory aggravating circumstance; and whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the offender and the offense.

According to the uniform capital sentencing report, defendant is a single black male who was twenty-five years old at commission of the crime. He was born in Mississippi. After the death of his father in 1965, he, his seven siblings and his mother moved to New Orleans. He attended public school until dropping out in the ninth grade.

Defendant's employment record is inconsistent and consists of a series of low-paying jobs in manual labor. He has been unemployed since a disabling injury in 1982. At the time of the offense, defendant's income consisted of Social Security and disability benefits. He and Martina Burns have five children, the fifth being born after defendant's trial, and defendant contributed to the support of the family until his arrest.

Defendant has no record as a juvenile. As an adult, he has been convicted twice for misdemeanor offenses, theft in 1983 and possession of stolen property in 1983. He has been arrested for attempted aggravated rape (charges refused in 1975) and for an unrelated murder (charges refused in 1984). At the time of trial in December, 1984, he had three pending counts of armed robbery. He stood trial in the present case as a first felony

offender, and the jurors were not informed of the details relating to his prior arrests or misdemeanor convictions. He age and lack of significant prior history of criminal activity were urged as mitigating fac'ors. La.C.Cr.P. art 905.5.

The results of a psychological evaluation indicate defendant has low average range of intellectual functioning, with a composite IQ score of 83.

Although the sixty-year female victim was white, race was not a factor in the trial. Defendant did not know the victim.

Arbitrary Factors

As to the influence of arbitrary factors, the prosecutor's closing argument in the penalty phase raises serious problems.

The prosecutor began his closing argument with a reminder to the jurors that they had told him in voir dire that they were willing to consider capital punishment and that he was going to hold them to that statement. He then admitted anger in the tone of his voice, stating:

> "I'm angry that we, you 12 people and the rest of us here, have to live in a society which tolerates people like that. You've heard five or six people come and take the stand. They've been very upset because they have a loved one who faces the possibility of electrocution. We couldn't put the family of Mrs. Dye on the stand."

The trial judge overruled defense counsel's objection "at this particular point".[7] The prosecutor then concluded that "we couldn't put that family on to tell you what they thought about her because that's not the issue in this case."

After arguing that defendant was clearly guilty in spite of his protestations of innocence, the prosecutor returned to the subject of the victim's family, stating:

> "I want you all to very carefully consider the family out there in your deliberation, because probably the most important person in their life was brutally shot down and murdered over some groceries and her purse. . . . Can any of us be safe now something like this is [d]one without you people saying, you people – cross section of the community, no, we're not going to stand for this. No we're not going to give you the benefit of life imprisonment. Because, ladies and gentlemen, if you go up there and you vote for life imprisonment he wins. He wins. He'll be happy as he can be because he has won. Life imprisonment means he's won because he knew all along that he was guilty. The evidence showed that he was guilty. He figured if he could get out of this by getting life imprisonment that he won. Let's talk very briefly about what life imprisonment is. Life imprisonment, ladies and gentlemen, isn't a matter of somebody being sent to Devil's Island and having to eat bread and water for the rest of their lives. Life imprisonment means that he's going to go

[7] The overruling of defense counsel's objection was the basis of Assignment of Error No. 44.

> to a penitentiary in this sate and he going to be put there to – "

Defense counsel's objection to remarks on what goes on in the penitentiary was overruled "at this point". The prosecutor continued:

> "That means that he goes to a penitentiary and he starts another life, life, life, life. He continues to live. He makes new friends. He'll continue to have visits from all of those people. They'll be able to go see him on Thanksgiving, Christmas, his birthday, on weekends. They'll be able to go talk to him. Do you know when the Dye family, when they go Memorial Day, when they go on Mrs. Dye's birthday or Christmas or Thanksgiving, do they talk to Mrs. Dye? They go to a grave site and there's a stone there. They don't get to talk to her. He life was ended. It was ended in the most violent fashion imaginable. That's why I'm angry, because there wasn't one damn reason in the world why he had to do that. If he wanted to take her purse, if he wanted to take her groceries or her car, he didn't have to kill her. That's why we're here right now and that's why my voice is raised because that man should be sentenced to death for what he did. Life imprisonment, visits. He'll be out there playing softball, games, continuing to live, to laugh, because after the initial period of getting used to that he'll start another way of life. He'll have dreams, he'll read books, he'll watch cable television. Mrs. Dye won't. Mrs. Dye's family won't."

At this point the trial judge sustained defense counsel's objection to the comment about cable television. The prosecutor then addressed the seriousness of the crime.

When he added that "I don't need to sit here and tell you the state of affairs in this parish and I'm not going to", defense counsel objected and moved for a mistrial. The judge sustained the objection and admonished the prosecutor not to refer to that topic again, but refused to grant a mistrial.[8]

The prosecutor then pointed out the penalty range for armed robbery of up to ninety-nine yeas and argued that an armed robber would be motivated to kill the only witness if he was likely to get an equivalent sentence of life in any event. Then he requested the jurors "to return a capital verdict against this man and let that be a message –". At this point, the trial judge sustained an objection and admonished the jury to disregard the comment, but again denied a mistrial.

The prosecutor then completed his closing argument by warning the jurors not to allow the defense attorney "to put a guilt trip on you" and by reviewing the highlights of the senseless killing. He then asked for the death penalty for this crime against the victim, the community and society in general.

After defense counsel's closing argument, the prosecutor's rebuttal closing was reasoned and contained no appeal to prejudice.

Argument of counsel shall not appeal to prejudice. La.C.Cr.P. art. 774. The prosecutor may not turn closing argument into a plebiscite on crime. *State v. Sugar*, 408

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[8] This refusal to grant a mistrial was the basis of Assignments of Error Nos. 45, 46 and 47.

So.2d 1329 (La.1982). Here, the prosecutor's closing argument was improper at several points, but defense counsel immediately objected and the trial judge sustained the objectiuons [sic]. The principal issue is whether the improper remarks in closing argument require the setting aside of the sentence. The court must determine whether the jurors were influenced by the remarks and whether the remarks contributed to the verdict. *State v. Knighton*, 436 So.2d 1141 (La.1983).

This court has set aside death penalties when we were unable to conclude that an improper closing argument by the prosecutor did not influence the jury's recommendation. *State v. Willie*, 410 So.2d 1019 (La.1982); *State v. Robinson*, 421 So.2d 229 (La.1982). Here, the prosecutor made some improper comments which attempted to appeal to the prejudice of the jurors. However, the remarks in this case fall far short of the tirade by the prosecutor in the *Robinson* case. Indeed, defense counsel in this case was vigilant and objected immediately to the prosecutor's attempts to appeal to prejudice when he began to stray into prohibited subjects such as cable television at Angola, the state of affairs in this parish, and the jury's sending out a message by a death verdict.

A review of the closing argument in its entirety leads us to conclude that the prosecutor's improper remarks did not render the jury's sentence recommendation unreliable. *State v. Sharp*, 418 So.2d 1344 (La.1982). Credit should be accorded to the good sense and fairmindedness of jurors who have heard the evidence and have been instructed repeatedly by the trial judge that arguments of counsel are not evidence. *State v. Dupre*, 408 So.2d 1229 (La.1982).

Statutory Aggravating Circumstances

The single aggravating circumstance found by the jury was clearly supported by the evidence, as we noted in discussing the sufficiency of the evidence in the guilt phase. Moreover, this court has consistently rejected the argument that an aggravating circumstance which is an essential element of the crime under Louisiana's definition of first degree murder cannot constitutionally be used as an aggravating circumstance to support the jury's recommendation of death in the penalty phase. *State v. Knighton*, 436 So.2d 1141 (La.1983); *State v. Sawyer*, 422 So.2d 95 (La.1982).

Proportionality

A comparative proportionality review is not constitutionally required, as long as the state's overall capital sentencing system provides adequate protection against the arbitrary infliction of the death penalty. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). However, this court, pursuant to Supreme Court Rule XXVIII § 1(c), conducts a proportionality review as a further safeguard against arbitrariness.[9]

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[9] Proportionality review was never intended as a method of achieving "slide-rule" uniformity in the application of the death sentence. The role of proportionality review under the 1976 statute, as originally enacted, was to identify those death eligible cases in which juries recommended the death sentence so infrequently that the recommendation of death in the particular case might be deemed the "action of an aberrant jury". *Gregg v. Georgia*, 428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976). The Supreme Court clearly stated the purpose:

> "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the *action of an aberrant jury*. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death." (emphasis supplied)

Of the sixteen death penalties recommended by juries in Orleans Parish since 1976, two cases are very similar to the present one. The sentences in *State v. James*, 431 So.2d 399 (La.1983), and *State v. Mattheson*, 407 So.2d 1150 (La.1981), were based on murders committed during armed robberies.

A killing to overcome the victim's resistance to armed robbery is the type of crime which creates abject terror among law-abiding citizens. Such an unprovoked crime against an elderly person who is pursuing her daily homemaking chores is totally abhorrent to a civilized society.

Furthermore, defendant can point to no mitigating circumstances, other than his lack of a prior significant criminal history, which would suggest that the jury acted unreasonably. While the murderers in *James* and *Mattheson* did have significant prior criminal histories, this court has affirmed death penalties in other cases of killings during armed robberies when the murderer lacked a substantial criminal record and there were no other mitigating factors. See *State v. Summit*, 454 So.2d 1100 (La.1984); *State v. Byrne*, 483 So.2d 564 (La.1986).

Here, defendant was not a minor participant, but rather was the triggerman and sole actor in carrying out a plan by which he armed himself and lay in wait in a supermarket parking lot for a randomly selected elderly female.[10] There was no moral justification or extenuating circumstance, and there was no influence of mental or emotional disturbance. Defendant was not a teenager nor a person of impaired capacity.

Because of the viciousness of the crime and the lack of any strong factors in mitigation, we are convinced that the jury's verdict was not the "action of an aberrant jury." *Gregg v. Georgia, supra.*

Decree

The conviction of first degree murder and sentence of death are affirmed.

MARCUS, J., concurs and assigns reasons.

DENNIS, J., concurs with reasons.

MARCUS, Justice (concurring).

I do not agree with the majority's view that defendant was entitled to call Wallace to the stand and employ leading questions and to impeach him simply because he was potentially an adverse witness. When a defendant calls a witness not yet called by the state, the witness

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[10] The only case in which this court set aside a death penalty as disproportionate was *State v. Sonnier,* 380 So.2d 1 (La.1979). The younger of two brothers who raped and murdered a young girl was spared, not because of the lack of significant aggravating circumstances, but because he was under the domination of his older brother (who has since been executed) and played a relatively minor role in the horribly vicious crime.

becomes the defendant's. No one can impeach his own witness unless (1) the witness' testimony took him by surprise or (2) the witness proved to be hostile. La.R.S. 15:277, 15:487. *State v. Nuccio,* 454 So.2d 93 (La.1984); *State v. Rogers,* 324 So.2d 403 (La.1975); *State v. Bush,* 297 So.2d 415 (La.1974); and *State v. Brent,* 248 La. 1072, 184 So.2d 14, *cert. denied,* 385 U.S. 992, 87 S.Ct. 605, 17 L.Ed.2d 452 (1966). However, I do not consider the prosecutor's comments during closing argument in the guilt phase to be reversible error. Accordingly, I respectfully concur.

DENNIS, Justice, concurring.

I respecttully concur in the decree affirming the conviction and sentence, but disagree with the majority opinion in the following particulars:

Denial of Motion to Suppress Evidence

(Assignment Nos. 2 and 8)

It is correct to say the particularity requirement in the fourth amendment for warrants is to prevent a search of the wrong premises and to insure a person's freedom from unwarranted police intrusion, but these are not the only purposes of the particularity requirement. Rather, the requirement of particularity also reflects several other underlying goals of the amendment – the prevention of general searches, the ensurance that the executing officer knows what items are to be seized and those that are not and to prevent the issuance of warrants on vague or doubtful bases of fact. *Marron v. United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); and *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374

(1931). See 2 W. LaFave, Search and Seizure, A Treatise of the Fourth Amendment, § 4.6(a), at 234-36 (1987).

Additionally, the majority's statement that a criminal record alone is not enough to rebut the credibility presumption of a citizen informer is too broad a pronouncement. In *State v. Morris*, 444 So.2d 1200, 1203 (La.1984), this court more precisely stated that a "[c]onviction of a prior crime should not suggest unreliability if the prior offense is unrelated to the crime witnessed or there is no apparent motive for reporting criminal activity, such as the hope of reducing a penalty."

Intimidation of Defense Witnesses

(Assignment No. 10)

It was unconscionable for the trial court to call the defendants' witnesses aside, warn them of the possibility of their prosecution for perjury, and advise them of the right against self incrimination just prior to their taking the witness stand. Such a practice should be more strongly reprobated than done by the majority because of the possibility that it may be used to discourage defense witnesses from testifying. Nevertheless, the error was harmless in this case since both witnesses testified favorably for the defendant despite the trial judge's clearly improper actions.

Curtailment of Closing Argument

(Assignment No. 23)

The trial court incorrectly curtailed defense counsel's closing argument when it forbade him to ask the jury

during closing argument to consider why the prosecutor had failed to call Joseph "Beanie" Wallace. There was sufficient evidence to justify the argument. A police mug shot of Wallace had been entered into evidence and the defendant had testified, when asked about Wallace's motive for wanting to frame him, that Wallace "had been down for murder once and he don't need to be down no more." However, the defense attorney effectively made his point before the objection was sustained, and the error was therefore harmless.

Proportionality

The majority states, "A comparative proportionally review is not constitutionally required, as long as the state's overall capital sentencing system provides adequate protection against the arbitrary infliction of the death penalty," citing *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). This statement is, however, incomplete because it disregards the requirement by state constitution and our rule of a proportionality review of every capital sentence. In *State v. Brogdon*, 457 So.2d 616, 631 (La.1984), citing La. Const. Art. I, § 20 and La. Supreme Court Rule XXVIII, we held that "This court is required by our state constitution and its own rule in each capital sentence review to conduct a comparative proportionality review to determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

ON APPLICATION FOR REHEARING

PER CURIAM.

On original hearing, the court failed to include in its decree the language generally used in the affirmation of a death sentence which stays the execution of the sentence until denial of a timely application for certiorari and of a timely application for rehearing from the denial by the Supreme Court of the United States. Accordingly, the decree on original hearing is amended to read as follows:

> For the reasons assigned, defendant's conviction and sentence are affirmed for all purposes except that this judgment shall not serve as a condition precedent to execution as provided by LaR.S. 15:567 until
>
> (a) defendant fails to petition the United States Supreme Court timely for certiorari,
>
> (b) that court denies his petition for certiorari,
>
> (c) having filed for and been denied certiorari defendant fails to petition the United States Supreme Court timely under their prevailing Rules for applying for rehearing of denial of certiorari, or
>
> (d) that court denies his application for rehearing.

In all other respects, the application for rehearing is denied.

LOUISIANA SUPREME COURT
CASE NO. 86-KA-0880

STATE OF LOUISIANA

VS.

CURTIS KYLES

CASE NO. 303-970, SECTION "F"

Consolidated with

CURTIS LEE KYLES

VS.

ROBERT HILTON BUTLER, Warden,
Louisiana State Penitentiary,
Angola, Louisiana

JUDGMENT

The Court denies both the defendant's Motion for New Trial and the relief sought in defendant's Writ of Habeas Corpus. In rejecting the defendant's claims in both of these proceedings, the Court makes the following observations and draws the following conclusions:

I.

Defense Counsel, Martin Regan, was not ineffective within the meaning of Strickland versus Washington, 104 S.Ct. 2052 (1984), in representing the defendant at trial. The Court finds that Mr. Regan provided the defendant with a vigorous, dedicated and more than adequate defense. As he always has been, in the many cases he has tried before this Court, Mr. Regan was a tenacious advocate on behalf of his client. His reputation as an attorney

who is always prepared for, familiar with his case, and professional in his presentation remains intact despite the outcome of this particular case.

This court appreciates Mr. Regan's self-deprecating testimony at the Motion for New Trial hearing; wherein he offered the opinion that he was ineffective in his representation in this case. Despite this most humble act on the part of counsel, the Court begs to differ with him.

Much has been made of Mr. Regan's opinion that he failed miserably in his defense of Mr. Kyles when he chose not to call Joseph Wallace as a witness. Mr. Regan indicated that he incorrectly viewed the law as saying that if he called Joseph Wallace as a witness that he would have to vouch for his credibility unless he could have shown both hostility and surprise on the part of Mr. Wallace at the time Mr. Wallace testified.

This was the law of Louisiana at the time of both of Mr. Kyles' trials. At that time, the rule regarding such situations was found in La. R. S. 15:487, which provided:

> "No one can impeach his own witness, unless he have [sic] been taken by surprise by the testimony of such witness, or unless the witness show [sic] hostility toward him, and, even then, the impeachment must be limited to evidence of prior contradictory statements."

The law of Louisiana has subsequently been amended in this regard by virtue of the adoption of Article 607 of the Louisiana Code of Evidence. But at the time of Mr. Kyles' trial, under then existing law, Defense counsel certainly made an intelligent and strategically

correct decision in not placing Mr. Wallace on the stand as a defense witness.

The Court further finds that the fact that Mr. Regan never made use of an investigator in connection with this case and never consulted with a possible expert on the identification issue involved in this case is not evidence of the ineffectiveness on his part. As is further noted elsewhere in this judgment, the evidence on the issue of identification was overwhelming in this case. The Court fails to see how an investigator and/or an expert could have in any way changed the outcome of the ultimate trial of this matter.

II.

The Court finds no merit to any of the Defense allegations regarding prosecutorial misconduct and alleged violations of Brady versus Maryland, 83 S.Ct. 1194 (1963).

Assuming, arguendo, that certain background information concerning and [sic] statements of Joseph Wallace were withheld by the State; the Court finds that this is not ultimately prejudicial to the Defense. The Court concludes that none of this evidence would have ultimately assisted the Defense to any significant degree in this case.

It is important to note that Joseph Wallace was never called as a witness by the State. As such, there never could be an attempt by the Defense to attack the character and credibility of Mr. Wallace.

Hence, the State never sought to vouch for the credibility of Mr. Wallace. As such, there would be no basis

for the attempted impeachment of Mr. Wallace by the Defense.

It should be further noted that the Defense was given ample opportunity, and successfully placed before the jury through credible evidence, the basic premise of the Defense's case, that Joseph Wallace was in fact the killer of Mrs. Dye and that Joseph Wallace "framed" the defendant for this killing. The Defense even went so far as to present evidence as to a possible bias and motive; i.e. Wallace's desire to gain the affection of Curtis Kyles' female acquaintance – by having Kyles convicted of this crime and thereafter incarcerated.

The jury was more than adequately exposed to the possibility that Joseph Wallace was in fact the killer. They were aware that he was in fact in possession of the victim's car shortly after her murder.

The jury was likewise given the opportunity to see Mr. Wallace in person as he was brought into open court at the behest of the State. He was made to literally stand before the jury. At the same time, the jury was afforded the opportunity to compare his height, his size, his physical characteristics to those of the defendant.

Of course, the jury ultimately rejected the defense in this case and concluded that Mr. Wallace was not in fact the killer; but that Mr. Kyles was.

III.

It should be further noted that there was testimony taken at the Post Conviction Motion hearing that involved Johnny Burnes. This Court, having had the

opportunity to view Mr. Burnes on the witness stand and to hear his testimony, has chosen to totally disregard everything that he has said. Purely by coincidence, this Court has presided over the trial of Mr. Burnes, wherein he was convicted of the killing of Joseph Wallace.

IV.

In conclusion, this Court finds that the evidence against the defendant in this case is overwhelming. The following facts, proven beyond a reasonable doubt to the jury that heard this case, cannot be overlooked:

1. A series of unrelated, totally disinterested, unbiased witnesses, from every walk of life identified, without hesitation or reluctance, at two separate trials Curtis Kyles as the killer of Mrs. Kyle.

2. The weapon used to kill Mrs. Dye was found behind the stove in the kitchen of the defendant's home on the weekend following the murder, within some 72 hours of the homicide.

3. Also found in the home was a collection of various pet foods. These pet foods were identified at trial as being the same brands that Mrs. Dye purchased weekly for a group of cats and dogs that she fed on a daily basis. This link between the brands of pet food and Mrs. Dye was established by the uncontradicted testimony of her husband. The defendant took the witness stand and in the opinion of this Court *perjured himself* when he testified that he purchased these pet foods at Schwegmann Supermarket

because they happened to be on sale. This testimony was completely contradicted by the State's rebuttal witness, the employee of Schwegmann's Supermarket; who testified that absolutely none of these items were on sale during the week of Mrs. Dye's death. Additionally, it should be noted that there was no real evidence that the defendant, at the time of his arrest, owned any cats or dogs. The police testified that they saw no evidence of any pets at the defendant's home when he was arrested. It should be noted that one bottle of pet shampoo was located during a search of the home. This, however, appeared to be of some age, and the container was at least half empty. The Court is of the opinion that this obvious lie on the part of the defendant may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire defense in this case and led to the verdict rendered.

4. As noted earlier, the jury saw Joseph Wallace in court. They were given every opportunity to observe how he clearly and distinctly did *not resemble* the defendant in this case.

5. More importantly, each of the witnesses was likewise afforded the opportunity in open court to observe Joseph Wallace. Each of them was categorically stated that Joseph Wallace *was not* the killer. At the same time, each again reaffirmed their opinion that the defendant, and the defendant alone, was responsible for the death of Mrs. Dye.

6. The victim's purse and personal belongings were found in a garbage can that had been placed for collection on the curb outside of the defendant's home.

Was Joseph Wallace a killer? The Defense has portrayed him as the killer of a seaman and an elderly lady in Lakeview. This portrayal may or may not be accurate. However, this Court is convinced, as was the jury, that Joseph Wallace was not the killer of Mrs. Dye; but that Curtis Kyles was the person responsible for the death of Mrs. Dye. The Court finds that the new evidence allegedly available, even if presented to another jury, would not in any way lead to a different outcome of this case.

New Orleans, Louisiana, this 9th day of November, 1989.

/s/ Dennis J. Waldron
DENNIS J. WALDRON
Judge, Section "F"

Supreme Court of Louisiana.

STATE ex rel. Curtis Lee KYLES

v.

Robert Hilton BUTLER, Warden,
Louisiana State Penitentiary.

No. 89-KP-0041.

Sept. 14, 1990.

In re Kyles, Curtis Lee; – Plaintiff(s); applying for supervisory and/or remedial writs; Parish of Orleans, Criminal District Court, Div. "F", No. 303-970.

Denied.

CALOGERO, C.J., and DENNIS, J., would grant the writ.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CURTIS LEE KYLES	CIVIL ACTION
VERSUS	NO. 90-4301
JOHN WHITLEY, WARDEN LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA	SECTION "K"

JUDGMENT

(Filed March 30, 1992)

This matter having come before the court and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED, AND DECREED that the petition for writ of habeas corpus filed by Curtis Lee Kyles is DENIED and that this action is hereby DISMISSED with prejudice, each party to bear their own costs.

IT IS FURTHER ordered that the stay of execution is hereby lifted.

New Orleans, Louisiana, this 30th day of March 1992.

/s/ George Arceneaux, Jr.
GEORGE ARCENEAUX, JR.
UNITED STATES DISTRICT
JUDGE

United States Court of Appeals,
Fifth Circuit.

Curtis Lee KYLES, Petitioner-Appellant,

v.

John P. WHITLEY, Warden, Louisiana State Penitentiary, etc., et al., Respondents-Appellees.

No. 92-3310.

Oct. 14, 1993.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before KING, HIGGINBOTHAM, and JONES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Curtis Lee Kyles, an inmate sentenced to capital punishment, appeals the judgment of the district court, denying him the writ of habeas corpus. In 1984, a Louisiana court convicted Kyles of shooting and killing Mrs. Dolores Dye during a daylight armed robbery before many witnesses. As he did before the jury that convicted and condemned him, Kyles asserts innocence and maintains that he was framed by a now-deceased acquaintance. Although phrasing his claims in constitutional terms, Kyles essentially asks this court to reconsider the defensive theory rejected by the jury nine years ago. We affirm.

Kyles alleged numerous constitutional violations in his petition for writ of habeas corpus. In a thorough, forty-six page opinion and order, the district court

rejected all of them.* On appeal, Kyles narrowed his focus by briefing only two claims, under *Brady* and *Strickland*.[1] As a habeas court, we do not sit to rehear Kyles's trial. Nonetheless because both *Brady* and *Strickland* analyses inquire into probable effects on trial outcomes, we begin by emphasizing this conclusion: a complete reading of the record demonstrates that Kyles faced overwhelming evidence of guilt. In particular, three eye-witnesses positively identified Kyles among a photographic lineup within 96 hours of the murder. Those three, joined by a fourth eyewitness, testified at trial that Kyles was definitely the gunman, even after comparing him with the man that Kyles contends framed him. None of the evidence offered by Kyles – or that he alleges he was prevented from offering – effectively undermined the powerful weight of this eyewitness testimony.

We also note that the limited focus of a federal habeas court was recently emphasized when the Supreme Court held that "the standard for determining whether habeas relief must be granted is whether the . . . error 'had a substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson*, ___ U.S. ___, ___, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). This standard controls all trial, as distinguished from structural, errors – those whose impact may be quantitatively

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* See Appendices A and B.

[1] *Brady v. Maryland*, 393 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

assessed in the context of other evidence in order to determine their effect on trial outcomes. *See Arizona v. Fulminante*, 499 U.S. 279, ___, 111 S.Ct. 1246, 1249, 113 L.Ed.2d 302 (1991).

I

On December 7, 1984, a Louisiana jury convicted Curtis Lee Kyles of first degree murder for violation of La.R.S. 14:30 and sentenced Kyles to death.[2] The conviction and sentence were affirmed on direct appeal by the Supreme Court of Louisiana in a published opinion. *State v. Kyles*, 513 So.2d 265 (La.1987), *cert. denied*, 486 U.S. 1027, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988). The Supreme Court of the United States denied Kyles' petition for a writ of certiorari on direct appeal. On January 2, 1989, Kyles commenced state habeas corpus proceedings by petitioning the state district court for a stay of execution, post-conviction relief, writ of habeas corpus, and a new trial based on newly-discovered evidence. This petition alleges that Kyles' constitutional rights had been violated in twenty ways. Following an evidentiary hearing ordered by the Louisiana Supreme court, the state district court denied Kyles' motions and rendered judgment. In September 1990, the Louisiana Supreme Court denied Kyles' application for review of the judgment.

Soon after the state court set an execution date, Kyles commenced this habeas corpus proceeding in federal

[2] A previous trial ended in a mistrial after four hours of deliberation because jurors could not reach an unanimous verdict regarding guilt or innocence.

court pursuant to 28 U.S.C. § 2254. The federal district court reviewed the entire record, including the transcripts and pleadings from the trial court, direct appeal, and state collateral proceedings. Concluding that Kyles was given a fundamentally fair trial with able assistance by counsel, the district court denied Kyles' petition for writ of habeas corpus on March 24, 1992.

Kyles filed a notice of appeal on April 2, 1992. The district court issued a certificate of probable cause. After filing his notice of appeal, Kyles filed a Rule 60(b) motion for post-judgment relief in the district court, claiming newly-discovered evidence. We granted a motion to hold this appeal in abeyance pending the disposition of that motion. The district court denied the Rule 60(b) motion on June 2, 1992. On August 7, 1992, we vacated the district court's June 2, 1992 order and remanded with instructions to deny Rule 60(b) relief on the ground that a petitioner may not use a Rule 60(b) motion to raise constitutional claims that were not included in the original habeas petition. This appeal then proceeded.

II

At approximately 2:20 p.m. on September 20, 1984, Mrs. Dolores Dye, a sixty-year-old woman, was murdered in the parking lot at the Schwegmann Brother's grocery store on Old Gentilly Road in New Orleans. Testimony at trial established that a young black man accosted Mrs. Dye as she placed her groceries in the trunk of her red Ford LTD. One witness testified that the victim threw her purse into the trunk, slammed the lid, and tried to get away. The assailant grabbed her, they began struggling,

and he wrestled her to the ground. Finally, the assailant drew a revolver from his waistband and fired it into Mrs. Dye's left temple, killing her instantly. The gunman than took Mrs. Dye's keys from her hand, got into the Ford LTD, and drove from the parking lot. After turning onto the street, a traffic light caused the LTD to stop beside a truck driver, Robert Territo, who had seen the shooting and then viewed the gunman's face at close range. Another witness, Isaac Smallwood, was working at the corner of the parking lot. The LTD drove close by him after it left the parking lot, allowing Smallwood to see the driver's face. Henry Williams was also working outside at the parking lot. He witnessed the struggle and murder and saw the gunman's face as the LTD passed slowly by on the street within twelve feet of him.

Police spoke to Smallwood, Williams, and three other eyewitnesses at the scene. Later, Territo and Darlene Cahill called police to report witnessing the murder. All of these witnesses described a young black man, who wore a dark-colored shirt, blue jeans, and his hair in plaits.

The investigation was aided on Saturday night, September 22, when Joseph "Beanie" Wallace informed officers that a man named "Curtis" had sold him a red Ford LTD. Using the address Beanie provided, police found Curtis Kyles' name and Beanie identified Kyles' photograph. Beanie stated that on Friday, he paid Kyles $400.00 for the LTD and drove it around New Orleans. Only later did he connect the car with the murder and call police. Detective John Miller testified during post-conviction proceedings that Beanie had spoken to him on previous occasions about various, unrelated shootings, although

this case was the first time that Detective Miller could use Beanie's information because it was a homicide. Around midnight, Beanie led police to the car that Kyles sold him. Police soon established that the LTD in Beanie's possession belonged to the victim.[3]

For security purposes, a police officer was wired to record this conversation. During it, Beanie informed officers that Kyles lived at 2313 Desire, the apartment of Kyles' common-law wife, Martina "Pinky" Burns.[4] Beanie claimed that Kyles had removed Schwegmann's grocery sacks from the LTD before turning it over to Beanie. Acting on this information, Detectives Lambert and Saladino went to Desire Street at 1:00 a.m., Monday morning, September 24. They picked up five identical plastic bags of garbage that had been placed outside Kyles' residence. Inside one of those garbage bags, police found the victim's purse, identification, and other personal belongings wrapped in a Schwegmann's paper grocery sack.

A search warrant for the Burns/Kyles residence had been issued at 6:07 p.m. on September 23. At approximately 10:40 a.m. the following day officers arrested Kyles outside the residence and searched the apartment. Behind the stove, they found a .32 caliber revolver that

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[3] The police agreed to pay Beanie $400.00 to compensate him for the amount that he had paid to Kyles for the car.

[4] This name sometimes appears in the record spelled "Burnes." We use the term "common-law wife" loosely. Pinky was the mother of Kyles' four children, and he spent about four nights a week at her apartment on Desire Street.

contained five live rounds and one spent cartridge. Ballistics tests later confirmed that this pistol was used to murder Mrs. Dye. In a chifforobe in another part of the residence, officers found a homemade shoulder holster that fit the murder weapon. They also discovered two boxes of ammunition in a bedroom dresser drawer. One box contained .32 caliber rounds of the same brand as those found in the pistol.

Back in the kitchen, pet food was found in Schwegmann's sack located in a cabinet with pots and pans. No other human or pet food was located in that cabinet. Several cans of cat and dog food were discovered, including Nine Lives brand cat food and Kal-Kan brand dog food. No pets, however, were present in the household. Detective Dillman testified that police found no cat litter nor a litter box, although a photograph of the chifforobe shows a bottle labelled "Hart Flea." The victim's husband, Mr. Robert Dye, testified at trial that his wife usually purchased several brands for their cats and dogs, including Nine Lives and Kal-Kan.

Partial fingerprints were found on the victim's effects, but none was sufficient for an identification. No fingerprints were found on the murder weapon or in the LTD, but Kyles' prints were recovered from a Schwegmann's cash register receipt found on the floor of the LTD. The receipt's contents were illegible, making it impossible to read the items purchased or date, because the chemical process used to raise the fingerprints obliterated the ink.[5]

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[5] Before the piece of paper was processed, the police had noted that it was a cash register receipt from Schwegmann's, but no other information regarding its contents was recorded.

After Kyles became a suspect, Detective John Dillman prepared a photographic line up. On Monday, September 24, Dillman showed the lineup to five eyewitnesses to the murder. Three of them instantly picked Kyles out from the array of photographs of young black men; another tentatively chose Kyles. These three witnesses as well as a fourth eyewitness who was not asked to view the photographic lineup, also positively identified Kyles at trial as the gunman.

The defense contended at trial that the initial informant, Beanie, framed Kyles. While Kyles denied any involvement in the murder, his defense implied that Beanie was the murderer. After all, Beanie possessed the LTD when he spoke to police, and the defense theory accused Beanie of planting the victim's possessions and the murder weapon at Kyles' residence. Beanie did not testify at the trial for either the prosecution or the defense. Four defense witnesses – Kevin Black, Ronald Gorman,[6] Johnny Burns, and Kyles himself – testified that they saw Beanie in a red car similar to the victim's after the killing on Thursday, September 20.[7] Defense witness Donald Powell stated that Beanie tried to sell him the LTD on Friday for $300. Johnny Burns testified that Beanie changed the license plates on the LTD Friday night, demonstrating that Beanie knew the car was stolen.

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[6] Gorman admitted at trial to a felony conviction for armed robbery.

[7] Black, Gorman, and Burns admitted that they were friends of Kyles. Johnny Burns was his brother-in-law.

— Central to defense was the theory that Beanie had planted the most incriminating evidence in Kyles' apartment and garbage. Defense witnesses testified that Beanie attended a gathering at Kyles' residence on Sunday night, September 23. The testimony of Kyles' friends and relatives conflicted as to the number of persons present and what dinner was served. Johnny Burns, Pinky's brother and so Kyles' brother-in-law, testified that during this evening he saw Beanie stooping near the stove. As noted, the murder weapon was found behind this appliance. Kyles also testified in his own defense. He denied owning the revolver and holster and stated that they must have been planted in the apartment. To explain the presence of .32 caliber rounds, Kyles stated that they were among ammunition he received when Beanie gave him a .22 caliber rifle as security for a loan. As a motive for the alleged effort to frame Kyles, the defense contended that Beanie was romantically interested in Pinky Burns, Kyles' common-law wife. Defense witnesses Cathy Brown and Carolyn Campbell said that they had witnessed Beanie make sexual advances to Pinky.

Kyles denied any involvement in the shooting of Mrs. Dye. To explain the Schwegmann's receipt bearing his fingerprints found in the LTD, Kyles stated that Beanie had picked him up in a red car on Friday and taken him to Schwegmann's, where Kyles purchased transmission fluid and a pack of cigarettes. He suggested that the receipt might have fallen from the bag when he removed the cigarettes. Kyles also testified that he had purchased the pet food found in his apartment at Schwegmann's on another occasion. Kyles claimed that he owned a dog, which was sometimes kept in Mississippi at his mother-

in-law's home. He did not know where it was at the time of trial. He also stated that his son kept a cat and that they fed other stray cats. Other defense witnesses gave varying testimony as to whether or not Kyles or his children had a dog or cat. When asked why he had purchased "so much" pet food, Kyles responded that he had "because it was on sale" at Schwegmann's. On rebuttal, the prosecution called Schwegmann's director of advertising to testify. Examining the cans of pet food, he denied that these brands had been on sale, explaining that the prices marked on the cans were not marked-down sale prices. During the prosecution's case-in-chief, the victim's husband testified that Mrs. Dye usually purchased the same brands of pet food as those found in Kyles' residence.

During rebuttal, the prosecution recalled each eyewitness. Beanie was brought into the courtroom, giving each eyewitness a chance to view him and Kyles simultaneously. The jury could also compare Beanie with Kyles. Each of the eyewitnesses attested that Kyles, not Beanie, was the person who committed the murder.

The jury unanimously found Kyles guilty of first degree murder. During the sentencing phase, the prosecution relied upon the evidence adduced during the guilt phase. The defense sought mitigation by presenting evidence of Kyles' close familiar relations with his relatives and children. Kyles also reasserted his innocence. Finding the aggravating circumstance of a killing during the commission of an armed robbery, the jury unanimously recommended the death penalty.

At the post-conviction evidentiary hearing, Kyles asserted that prosecutors had failed to disclose *Brady* materials to the defense. A number of documents in the police file were not delivered to the district attorney's office until after Kyles' conviction. Kyles received them during post-conviction litigation and maintains that they were favorable and material to his defense.

III

A. *Brady*

Kyles' principal claim is that the State withheld purportedly inculpatory material. In particular, he points to the following evidence that was not produced before trial: (1) the transcript of the recording of Beanie's first conversation with police officers; (2) a written statement signed by Beanie after police interviews; (3) notes taken by prosecuting attorney Cliff Strider during an interview with Beanie; (4) a police memorandum directing officers to pick up the garbage in front of 2313 Desire Street; and (5) a list of license place numbers from cars parked at Schwegmann's on Thursday night, September 23.

1. Governing legal standard

Our concern as a habeas court is confined to reviewing for constitutional violations. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). The prosecution must also disclose evidence useful to the defense for impeachment. *United States v. Bagley*, 473 U.S.

667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). A successful *Brady* claim must show (1) the prosecution's suppression of evidence, (2) the favorableness of that evidence, and (3) the materiality of that evidence. *United States v. Sink*, 586 F.2d 1041, 1051 (5th Cir.1978).

The Supreme Court defined materiality in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). According to *Bagley*,

> evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 682, 105 S.Ct. at 3383 (Blackmun, J.); *id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part). Writing for the Court, Justice Blackmun stated that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678, 105 S.Ct. at 3381.

Kyles argues that *Bagley's* analysis cannot be used in capital cases. We have previously rejected this general proposition. *See James v. Whitley*, 926 F.2d 1433, 1437 (5th Cir.1991). Kyles raises a slightly different argument than the one presented in *James*, by insisting that the alleged *Brady* violation affected not only the guilt determination, but his sentence as well. Thus, Kyles argues, Eighth Amendment considerations are triggered which require a stricter scrutiny than *Bagley's* probable-effect inquiry. Kyles therefore urges this court to use the "no effect" standard found in *Caldwell v. Mississippi*, 472 U.S. 320, 105

S.Ct. 2633, 86 L.Ed.2d 231 (1985), or the "harmless beyond a reasonable doubt" standard referred to in *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). In this case, the only effect the alleged *Brady* materials could have had on his sentencing would be through residual doubt. Kyles presented no mitigating evidence other than his close relationships with his family. The State relied upon the aggravating factor of murder during an armed robbery, which the jury found proved beyond a reasonable doubt in the guilt phase. We are not persuaded that the Eighth Amendment forecloses using the *Bagley* standard, when the only effect of *Brady* material would be to enhance the possibility of residual doubt after a jury finds guilt beyond a reasonable doubt.

2. Review of the evidence

We apply the *Bagley* standard here by examining whether it is reasonably probable that, had the undisclosed information been available to Kyles, the result would have been different. Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit.

a. Eyewitness testimony

The murder occurred around 2:20 p.m. in the parking lot of Schwegmann Brother's grocery store. Photographs of the crime scene taken that afternoon show a bright, sunny day. Many witnesses saw the murder, their attention prompted by the victim's screams, and then saw the

gunman's flight in the victim's car. Three of the eyewitnesses later identified Kyles in a photographic line-up. At trial eleven weeks after the murder, four witnesses identified Kyles as the gunman. Significantly, during each eyewitness's rebuttal testimony, Beanie was brought into the courtroom. After viewing Beanie and Kyles simultaneously, each eyewitness once more identified Kyles as the murderer. Also, the members of the jury received four opportunities to view both Beanie and Kyles after hearing the witnesses' descriptions of the gunman.

Kyles tried to undermine these identifications by pointing to discrepancies between his hairstyle and that in descriptions of the gunman. Territo, for instance, described the gunman's hair as a "wooly type braid" or "matted braid". Defense witness Carolyn Campbell stated that Kyles always wore his hair in a "bush" style. Kyles testified that he never wore his hair in plaits or braids. On the other hand, the defense claimed that Beanie fit the descriptions. Kyles' friends Kevin Black and Ronald Gorman testified that Beanie wore braids in his hair on Thursday, September 20. Donald Powell claimed that Beanie usually word braids, but a police photograph taken on June 6, 1984, shows that Beanie was wearing a Jherri curl fifteen weeks before the murder. Johnny Burns claimed that Beanie changed his hairstyle to a curl on Friday, September 21, after the murder.

Kyles contends that the first of the alleged *Brady* materials affects this identity issue. A police wire recorded Beanie's first conversation with police officers. This was done as a security measure, rather than as a means to preserve evidence. The transcript of this recording was not delivered to the prosecuting attorney before

trial and not disclosed to Kyles. According to this transcript, after stating that "Curtis" sold him the LTD on Friday, Beanie said that Kyles wore his hair in a bush "that day." We do not agree that this statement made the transcript material and so mandated disclosure. The jury otherwise learned of the supposed discrepancy between descriptions of the gunman's hairstyle and Kyles' hairstyle. Beanie's statement adds nothing new and is itself not decisive. Even if Kyles wore a bush "that day" – Friday – he may have worn braids on Thursday. The transcript also contains Beanie's statement that Kyles sometimes wore braids.

Kyles also claims that a second set of undisclosed documents impeded his challenge to the eyewitness identifications. He did not receive written statements signed by Smallwood and Williams. Kyles maintains that the jury's confidence in the eyewitness identifications would have been undermined if the defense could have impeached these two men with inconsistent statements in the descriptions they gave to police just after the murder. Williams, for example, originally described the gunman as being around 5'5" with a medium build. Kyles is closer to six feet tall and is slender. Yet when shown Kyles picture four days after the murder, Williams immediately recognized him as the killer. Kyles argues more forcefully regarding Smallwood. At trial, Smallwood described witnessing the shooting itself. The original statement he signed, however, states that he turned to look after hearing the gunshot. This discrepancy, Kyles insists, shows that Smallwood embellished his story, perhaps after coaching. Kyles overlooks, however, that Smallwood consistently stated that the gunman then drove the LTD close

by him. Smallwood always maintained that he got a good look at the killer then, and like Williams, immediately recognized Kyles in the photographic lineup. Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others.

To support the inference of mistake, Kyles cited testimony that he and Beanie resembled one another. Defense witness Ronald Gorman, for instance, stated that Beanie and Kyles resemble each other "a little" in profile. Gorman admitted, however, that the two men's sizes and builds were not alike. Johnny Burns also testified that the two men look alike from the side and had similar complexions. This testimony is belied, however, by the finding of the state trial court, during post-conviction proceedings, that Beanie "distinctly did *not resemble*" Kyles. Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face. More importantly, the eyewitnesses and the jury were allowed to compare Beanie and Kyles. After doing so, Smallwood stated, "they don't look nothing alike to me." Each eyewitness repeated their conviction that Kyles was the gunman they saw at Schwegmann's.

We note that none of the undisclosed documents bear on the credibility of eyewitness Territo's testimony. Territo observed Kyles and Mrs. Dye struggle, and witnessed the shooting itself. Then, as Kyles drove away in the LTD, he stopped at a red light in the lane next to Territo. As Kyles looked around, Territo got a good look at his face from a short distance away. Territo positively identified

Kyles as the gunman in a photographic lineup four days after the murder, and positively identified Kyles at trial twice – the second time after seeing Beanie and Kyles together. There is no evidence in the record that Territo made inconsistent statements at any time.

The theory that Beanie framed Kyles cannot explain the eyewitnesses' positive identifications. Kyles must assert that all four of them were mistaken. At trial, Kyles' counsel elicited from the eyewitnesses that they had previously seen Kyles in the courtroom.[8] The defense suggested that the in-court identifications resulted from Kyles' presence at the defendant's table, reinforced by viewing him there on prior occasions. This implication, however, could not weaken the three out-of-court identifications. Territo, Smallwood, and Williams each selected Kyles from among six similar photographs. There is no evidence that these photographic lineups, four days after the murder, were conducted improperly. Kyles can make no response but the improbable assertion that each witness coincidentally made the same mistake. We must bear this weighty evidence of guilt in mind while assessing the probable effect of other undisclosed information on the jury's verdict.

b. Tangible evidence

While the eyewitness identifications are convincing, Kyles is also faced with the great deal of incriminating

[8] Counsel implicitly referred to the first trial and suppression hearing. The jury was not informed of the prior trial.

evidence found in the apartment where he usually resided. The defense must also discount much of this evidence as coincidental. The remainder, however, Kyles attributes to Beanie's alleged effort to frame him.

Kyles maintains that the nondisclosure of the transcript also weakened his ability to establish Beanie's motives for framing him. The transcript assertedly contains three statements that may do so. First, in describing the trip to retrieve Kyles' car from the Schwegmann's parking lot, Beanie referred to the part of the lot where the murder had taken place. Kyles would infer from this statement Beanie's knowledge of, and hence involvement in, the murder. Second, Beanie described driving around New Orleans in the stolen LTD and his concern that he might be arrested because of this possession. These statements, Kyles argues, lead to one motive: that Beanie framed Kyles in order to escape prosecution himself for murder, complicity in murder, or dealing in stolen goods. Finally, the transcript reveals that Beanie requested $400 as reimbursement for the amount he paid Kyles for the stolen LTD. Kyles translates this statement into another motive by arguing that Beanie framed him to get a monetary reward.

At trial, Kyles elicited testimony supporting these two motives, as well as a third: that Beanie framed Kyles so that Beanie could pursue his romantic interest in Pinky Burns. The principal thrust of the defense case was that Beanie committed the murder. During cross-examination, Detective Dillman testified that Beanie possessed Mrs. Dye's LTD. Defense witnesses testified that Beanie fit the gunman's description. The presence of the murder

weapon was attributed to Beanie's visit to Kyles' apartment. We are not persuaded that Beanie's reference to the scene of the murder adds significant weight. The transcript also reveals that Beanie followed news accounts of the crime after they alerted him to the connection between the LTD and the murder. As to a pecuniary motive, Detective Dillman told the jury that Beanie received $400 after giving his tip. Beanie's request for the money on the transcript would have been cumulative, at best.

As further support for the defense theory, Kyles elicited testimony from the police that stolen license plates were on the LTD when it was found. Johnny Burns testified that he saw Beanie change the plates. The defense maintains that this evidence dispels any notion that Beanie was the unwitting bona fide purchaser of a stolen car. Once more, Kyles claims that the jury would have attached more significance to this evidence if the State had disclosed the transcript. It is true that on the transcript Beanie did not deny placing stolen plates on the LTD, even as officers made statements to that effect, but the state never urged and no prosecution witness ever stated that Beanie was an innocent buyer. The State did not call Beanie as a witness, nor inform the jury of the contents of his initial tip to police. Thus, the character or credibility of the informant was not presented to the jury by the prosecution.[9] Beanie's tip served only to explain why police showed Kyles' photograph to the eyewitnesses. The defense established that Beanie had possession of the LTD and that it bore stolen plates. A witness

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[9] This factor is discussed further *infra*, section III.B.

testified that Beanie placed them on the car. Thus, Kyles did lay the foundation for inferring that Beanie was not an unwitting buyer of stolen goods, but rather a knowing possessor who might have been the robber. On the other hand, proof that Beanie changed the plates is not inconsistent with Kyles' guilt. Ultimately, this evidence is at best cumulative on a factual point not rebutted by the State. The nondisclosure of this much of the transcript was insignificant.

Kyles also complains that the failure to disclose the transcript, and two other documents containing statements by Beanie, impaired his defense by preventing him from showing inconsistencies among those statements. After the recorded conversation shown by the transcript, Beanie went to police headquarters and signed a typewritten statement in the early morning hours of Sunday, September 23. Sometime later, before Kyles' trial and conviction, prosecuting attorney Cliff Strider interviewed Beanie and wrote several pages of notes regarding Beanie's statements at that time. Neither Beanie's written statement nor Strider's notes were disclosed to the defense before trial. Kyles claims that the defense could have furthered its case by informing the jury of inconsistencies, principally between the first two statements and Strider's notes.

In the first two statements, Beanie described this sequence of events: on Friday evening, September 21, Kyles sold the LTD to Beanie. Beanie then saw Kyles unload Schwegmann's grocery sacks and a purse from the LTD and place them in his apartment at 2313 Desire Street. After 9:00 p.m., Beanie accompanied Kyles and others to the Schwegmann's parking lot, where they

retrieved Kyles' own car. Prosecutor Strider's notes generally reflect the same events, but the dates, sequence, and some details changed. According to the notes, Beanie and Kyles retrieved Kyles' car from Schwegmann's on Thursday, at 7:45 p.m., rather than Friday after 9:00 p.m. Then, Beanie saw Schwegmann's sacks and a purse taken, not from the LTD, but from an apartment, whence they were taken to Kyles' apartment. The notes then state that Beanie purchased the LTD after the events, on Friday morning, rather than Friday evening.

The date of Strider's interview and notes is not disclosed by the record. Thus, the time span between the first two statements and this interview is unknown and the relative weight of the discrepancies is difficult to gauge. This is but one problem. More importantly, evidence that Beanie lacked credibility would have had little impact on this case. The prosecution did not call Beanie as a witness, nor vouch for the reliability of the tip that he gave police. Instead, the State mentioned this tip in passing, to explain why it focused on Kyles as a suspect and discovered evidence conclusively linking him to the murder.

While the defense portrayed Beanie as framing Kyles, it did not call Beanie as a defense witness. As we will explain in Section III.B., that decision was sound.[10]

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[10] As the dissent maintains, the *Brady* and *Strickland* claims are related, at least in part. In Section III.B., we conclude that defense counsel was not deficient in deciding not to call Beanie to testify. Beanie did not testify and impeachment material did not affect the trial. Our *Strickland* holding thus supports our *Brady* decision.

Calling Beanie as a witness threatened to do Kyles more harm than good, even if the defense could show that details of Beanie's claims were not consistently stated. Since Beanie did not testify, and there was no constitutional compulsion that he should have been, the failure to possess impeachment evidence material could not, in reasonable probability, have affected the outcome of the trial. Kyles has not shown on this basis that the three statements were material.

Detective Lambert testified during cross-examination that he picked up Kyles' garbage bags from the curb without apparent detection. Kyles' residence was not under police surveillance until after sunrise the following morning. The defense counsel used this cross-examination to establish that someone could just as easily have placed bags in that location, or put Mrs. Dye's purse into bags already there. The defense maintained that Beanie did so. Kyles now asserts that he could have argued this point more powerfully with two pieces of alleged *Brady* material. One was a police memorandum directing officers to pick up Kyles' garbage. The memo stated, "[w]e have reason to believe the victim's personal papers and the Schwegman's bags will be in the trash." According to Kyles, Beanie was the person who gave the police reason to believe that this evidence would be found. Kyles supports also this assertion with the transcript. In it, a police officer refers to Beanie having stated that if Kyles were smart, he would throw the items from the LTD into his garbage. Kyles argues that these documents would have

strengthened his theory that Beanie planted the purse in Kyles' garbage and directed the police to find it there.[11]

Even without these documents, Kyles made a credible case that Beanie could have planted this evidence. It was undisputed at trial that *anyone* could have had access to garbage bags sitting on the curb and that Beanie was attempting to incriminate Kyles. Kyles was able to argue that Beanie had one or more motives and an opportunity to plant this evidence where the police found it. Nonetheless, the jury rejected this argument. These documents might have offered some assistance to Kyles. In light of the entire record, however, we cannot conclude that they would, in reasonable probability, have moved the jury to embrace the theory it otherwise discounted.

To explain the murder weapon and holster, the defense depended upon testimony that Beanie had attended a gathering at Kyles' apartment on Sunday night, September 23. Several defense witnesses stated that Beanie was present at 2313 Desire that evening, and had dinner with Kyles and others. Johnny Burns stated that as many as 18 people attended the gathering, while Cathy Brown remembered six being present. The State questioned the credibility of these witnesses, given inconsistencies among their statements, but presented no testimony that this gathering did not occur. Asserting yet

[11] Kyles also argues that knowledge of these statements would have led defense counsel to call and cross-examine Beanie regarding the garbage bags. For reasons stated *infra*, section III.B., we fail to see how Beanie's testimony would have assisted Kyles.

another *Brady* violation, Kyles points to the notes of prosecutor Cliff Strider's interview with Beanie. These notes refer to Beanie's presence at Kyles' apartment for Sunday dinner. Corroborating Beanie's presence, however, adds little credibility to an assertion that Beanie smuggled evidence in and hid it about the apartment on that occasion.

Johnny Burns claimed that he came upon Beanie alone in the kitchen, stooping next to the stove under which the murder weapon was found. During the state post-conviction hearing, the same trial court judge who presided over Kyles' trial found that Johnny Burns' testimony was not credible. "This Court, having had the opportunity to view Mr. Burns on the witness stand and to hear his testimony, has chosen to totally disregard everything that he has said."[12] This trial court finding of fact is fairly supported by the record and must be presumed to be correct. 28 U.S.C. § 2254(d). Even aside from § 2254, appellate courts must give due regard to the credibility determinations of trial judges, who enjoy the advantage of observing demeanor. *See Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). Given that Johnny Burns' testimony lacked credibility, it is unlikely that the jury attached much weight to his claims.

Kyles testified that Beanie offered to sell him a pistol with tape wrapped around it that evening. The murder

[12] Between the time of Kyles' conviction and the post-conviction hearing, the same trial court judge presided over the trial and conviction of Johnny Burns for the 1986 shooting death of Joseph "Beanie" Wallace. *See State v. Burnes*, 533 So.2d 1029 (La.Ct.App.1988).

weapon, however, showed no signs of having been wrapped in tape. This testimony added nothing to the theory that Beanie planted the evidence.

If Beanie was present at Kyles' apartment on Sunday, this opportunity to plant evidence came *after* Beanie had contacted the police and implicated Kyles. If Beanie had been bent on framing Kyles, it was risky indeed to direct officers to the residence on Desire Street before he planted the evidence. Beanie did not know when the police might move. Indeed, he did not plant the gun until the night of the day following his disclosure to the police. The defense theory attributes cleverness to Beanie in every detail *except* this one. Once again, we conclude that the undisclosed documents would have been essentially cumulative on a point that the prosecution questioned, but did not rebut. We are not persuaded that these notes were material.

Kyles complains that he did not receive a computer printout containing a list of automobile license plates. This printout listed cars that were in Schwegmann's parking lot at 9:15 p.m. on the day of the murder, September 20. The list does not include Kyles' automobile. Beanie's initial statements to the police indicated that Kyles had retrieved his car from Schwegmann's on Friday. Using a photograph of the crime scene taken Thursday afternoon, the prosecution argued that Kyles car was visible at a distant edge of the lot. Kyles argues that the undisclosed printout would have rebutted this evidence, showing the jury that his car was not present at the crime scene.

During post-conviction proceedings, Detective John Miller testified that not all vehicles were included in the canvas and license check that produced the printout.

Thus, the printout did not disprove that Kyles's car was present at 9:15 p.m. Moreover, a list of cars found at 9:15 p.m. could not disprove that Kyles' automobile is the one visible in the photograph taken at the crime scene roughly six hours earlier.[13] Although the prosecution used the photograph to establish how Kyles arrived at Schwegmann's, before departing in the stolen LTD, no witness stated that Kyles' car remained there overnight. Thus, the printout was not inconsistent with the State's proof of guilt. More importantly, of course, we are not persuaded that it would, in reasonable probability, have induced reasonable doubt where the jury did not find it. The evidence of guilt was otherwise so overwhelming that the rebuttal of the photograph would have made no difference.

Finally, in assessing the probable effect of nondisclosure on Kyles' trial, we must consider evidence of guilt that is untouched by the alleged *Brady* violations. First, we consider the ammunition found in his apartment. Kyles claimed that Beanie gave him the two boxes of ammunition along with a .22 caliber rifle as security for a loan. He had loaded .22 caliber rounds into the rifle and left the other assorted ammunition in the boxes. He testified that Beanie often had guns, accounting for the other calibers, including the large number of .32 caliber rounds. While the evidence seized included mixed caliber rounds in one box, another box contained only .32 caliber

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[13] As Kyles has seized upon in these proceedings, prosecuting attorney Strider's notes reflect that Beanie and Kyles retrieved Kyles' car from the Schwegmann's parking lot at 7:45 p.m. on Thursday.

cartridges. It makes sense that Beanie would have given Kyles a container holding .22 ammunition, along with other rounds, at the same time that he gave Kyles a .22 rifle. It is not clear, however, why someone would also have given Kyles a box containing only .32 caliber rounds if Kyles did not own a .32 caliber firearm. The more likely inference, apparently chosen by the jury, is that Kyles possessed .32 caliber ammunition because he possessed a .32 caliber firearm. As noted, these rounds were the same brand as those found loaded in the murder weapon found in Kyles' residence.

It must not be forgotten that Kyles had to explain his possession of every piece of the incriminating evidence. Yet, no undisclosed document lessens the impact of the evidence regarding pet food from Schwegmann's. Kyles tried to account for its presence, but likely did his cause more harm than good. Kyles testified that he purchased at Schwegmann's the pet food found in his apartment. He must dismiss as coincidence the fact that Mrs. Dye usually purchased the same brands that he claimed to have chosen on one occasion because they were "on sale." In the first place, the weight of his explanation was undermined by his inability to explain what pets he planned to feed. He claimed to have kept a dog in the backyard, although it was sometimes kept in the country. Kyles stated that he had brought it home shortly before the murder. Police, however, found no sign of this pet. A friend of Kyles, Donald Powell, had not seen the dog for six months. When asked to explain why he purchased different brands of cat food, Kyles claimed that one was for his son's cat, the other for strays. He did not explain

any reason, such as a lower price for the latter, for making this distinction.[14] Most importantly, Kyles' explanation for the choice and quantity suffered a devastating attack from the State when it called Schwegmann's director of advertising. The brands found in Kyles' residence were not "on sale" in September 1984.[15] During post-conviction proceedings, the state trial court cited this rebuttal evidence in concluding that Kyles had perjured himself at trial, and opined that the jury was moved to disregard the defense's theory when Kyles' testimony was thus discredited.

As the state trial court found, in post-conviction proceedings:

> the Defense was given ample opportunity, and successfully placed before the jury through credible evidence, the basic premise of the Defense's case, that Joseph [Beanie] Wallace was in fact that killer of Mrs. Dye and that Joseph Wallace "framed" the defendant for this killing. . . .

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[14] In contrast, the victim's husband explained that their finicky cats would not eat the same brands, causing them to purchase a variety.

[15] The effort to recast Kyles' explanation as meaning "for sale" rather than "on sale" makes no sense in context. All brands of pet food were "for sale," so that interpretation cannot explain why Kyles choose [sic] Kal-Kan and Nine Lives. Nor would it explain why he brought home more than a dozen cans at one time for two family pets. The common meaning of "on sale" – marked down – would provide such explanations, but was contradicted by the Schwegmann's employee.

> The jury was more than adequately exposed to the possibility that Joseph Wallace was in fact the killer.

The jury, however, refused to believe this testimony or to infer even reasonable doubt from it. Kyles received a fair trial, one whose outcome is reliable. Kyles failed to undermine the overwhelming evidence of guilt at trial, and we are not persuaded that it is reasonably probable that the jury would have found in Kyles' favor if exposed to any or all of the undisclosed materials. Often cumulative and generally inconclusive, the facts therein simply do not add enough to his case.[16]

Finally, we note that *Brady* claims are subject to harmless error review. *See United States v. Garcia*, 917 F.2d 1370, 1375 (5th Cir.1990). Since Kyles has failed to show that it is reasonably probable that the nondisclosure of documents affected the outcome of his trial, we will not address whether he can show the actual prejudice of a substantial and injurious effect on the verdict. *See Brecht v. Abrahamson*, ___, ___, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993).

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[16] Judge King attaches significance to the fact that Kyles' first trial resulted in a mistrial. The first jury deadlocked in this capital case in just four hours. We can only speculate as to the reason. While some jurors may have seen the prosecution's case as weak, it is also possible that a juror's concerns about capital punishment promptly caused the intractable disagreement. We attach little significance to an event whose cause is unknowable, and rely instead upon our review of the record, as informed by the judgments of the state trial court and district court. Whatever the proof offered in the trial, this transcript contains overwhelming evidence of guilt.

B. *Strickland*

Kyles also contends that he received ineffective assistance of counsel at trial. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Kyles points to two principal errors allegedly committed by his trial counsel: failing to interview Beanie and failing to call Beanie as a defense witness. Under *Strickland*, Kyles must satisfy a two-prong test by showing that: (1) counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment, and (2) counsel's errors prejudiced the defense by depriving the defendant of a fair trial whose result is reliable. *Id.* at 687, 104 S.Ct. at 2064. Given the difficulty of this evaluation and the distorting effect of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. at 2065 (internal quotation omitted).

Kyles' trial counsel was Martin Regan. Kyles maintains that Regan's failure to call Beanie – coupled with the prosecution's non-disclosure of the contents of Beanie's statements – prevented the defense from attacking Beanie's credibility. The prosecution's case, however, did not depend upon Beanie's credibility. The State did not call Beanie to testify against Kyles. Prosecution witnesses did not mention Beanie by name except in response to the cross-examination by Regan. Regan asked eyewitnesses whether they had been shown Beanie and questioned Detective Dillman about him. Then, during redirect testimony, Dillman admitted that the police had no suspect

until after Beanie contacted them on Saturday, September 24. During his direct examination, Dillman had only alluded to Beanie's statements by testifying that officers received information that led them to Mrs. Dye's car, and that caused them to suspect Kyles. Leaving this testimony unelaborated, the prosecution depended upon the eye-witness identifications and the tangible evidence to link Kyles with the murder.

Of course, the defense did involve Beanie in the case by presenting the theory that Beanie had a motive to frame Kyles and an opportunity to plant evidence on his premises. Regan's questions laid the foundation supporting this theory. Regan did not, however, call Beanie as a defense witness. As a matter of trial strategy, the choice of witnesses enjoys a presumption of reasonableness. *Cf. Rivera v. Collins*, 934 F.2d 658, 660 (6th Cir.1991) (rejecting *Strickland* claim asserting counsel failed to call important witnesses). We are not persuaded that the decision not to call Beanie was an unreasonable one outside the bounds of professional judgment. To the contrary, the dangers of calling Beanie as a defense witness are very evident. As the district court put it, any reasonable attorney would perceive Beanie as a "loose cannon." According to the defense theory, Beanie was intent on seeing Kyles convicted for the murder of Mrs. Dye. Beanie's testimony almost certainly would have inculpated Kyles.[17] All of his statements to the police claimed that Kyles had possessed

[17] No reasonable attorney, believing that Beanie framed his client for murder, would have expected Beanie to take the stand and – as the district court said – give a "Perry Mason confession."

the LTD, sold it, and removed several Schwegmann's grocery sacks from it – testimony not presented to the jury during the prosecution's case-in-chief. The only exculpatory effect Beanie could have was an indirect one: Kyles maintains that competent counsel, armed with Beanie's prior statements, would have thoroughly impeached Beanie's credibility. At the same time, competent counsel would realize the risk that if Beanie's credibility were not *completely* destroyed by his demeanor and prior statements, then his incriminating testimony would have strengthened the prosecution's case. The cross examination of Beanie had to face the reality that his version was supported by disinterested eye witnesses. Only hindsight allows one to say that Kyles had nothing to lose and that counsel should have taken that risk. *See United States v. Lauga*, 762 F.2d 1288, 1291 (5th Cir.1985) (decision not unreasonable just "because 20/20 hindsight and knowledge of the intervening conviction might lead another attorney to opt otherwise").[18] Beanie was a two-edged sword, and we conclude that Regan did not act unprofessionally in choosing not to draw that weapon at trial.

During post-conviction hearings, Regan stated that the reason he did not call Beanie to testify was his misunderstanding of Louisiana evidence law. He believed that if the defense called Beanie, he would not be able to ask

[18] "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

leading questions unless he demonstrated both surprise and hostility. That belief was erroneous,[19] thus Kyles contends that a decision made on that mistaken basis was a professional deficiency. The Strickland analysis, however, judges the conduct of the defense according to the objective standard of the reasonable attorney. For the above-stated reasons, we conclude that a reasonable, competent attorney would not have erred in failing to call Beanie to testify and therefore the actual cause of trial counsel's failure to do so is not controlling.

Furthermore, the record demonstrates that Regan seriously considered calling Beanie. The defense placed Beanie under subpoena during the trial. *See State v. Kyles*, 513 So.2d 265, 273 (La.1987). During the post-conviction hearing, prosecuting attorney Strider testified that Regan discussed calling Beanie as a defense witness with him. The defense, however, had no guarantee about Beanie's behavior. Strider told Regan that he was not sure Beanie's attitude would be hostile. Moreover, Strider stated his belief that Regan expected the prosecution to call Beanie to testify during rebuttal, giving Regan a certain opportunity to lead and impeach the witness. Having considered the issue, Regan made a reasonable choice, and an appropriate one even if he correctly understood the applicable evidentiary rule.

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[19] In dicta in the district appeal decision, the Louisiana Supreme Court stated that Beanie "was clearly a witness hostile to the defendant, and defense counsel was entitled to employ leading questions and to impeach the witness through any prior inconsistent statements." *State v. Kyles*, 513 So.2d 265, 273 (La.1987).

Since Beanie did not testify and we are not convinced that he should have been called to testify, Regan's failure to interview Beanie had no apparent bearing on the conduct of the trial. It is not evident how interviewing Beanie would have allowed Regan to attack the prosecution's case more effectively, since that case did not rely upon Beanie's statements. An error by counsel does not satisfy the prejudice element of *Strickland* unless the defendant shows a reasonable probability that, but for the error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Regardless of whether the failure to interview Beanie constituted a professional deficiency, the requisite prejudice has not been shown.

Finally, Kyles suggested that Regan's failure to interview the eyewitnesses prior to trial led to ineffective assistance. One month before the trial, however, defense counsel cross-examined three of those four witnesses during the pretrial suppression hearing. Territo, Smallwood, and Williams testified at the suppression hearing because they made out-of-court identifications based upon a photographic lineup. We agree with the district court's conclusion that this hearing gave counsel an adequate opportunity to explore these witnesses' stories. Since counsel was not unprepared for the eyewitness testimony at trial, there is no probability that this alleged failure had an impact on the outcome.

IV

In conclusion, we iterate the trial counsel presented Kyles' theory that Beanie framed him. The defense suggested motives, with claims of Beanie's sexual interest in Kyles' common-law wife and by implying Beanie's own guilt for the murder. Counsel established that Beanie could have had access to Kyles' garbage bags on Desire Street. Defense witnesses claimed that Beanie came to Kyles' apartment on the night before the police search, and Johnny Burns testified to seeing Beanie stooping near the stove under which the murder weapon was found. The defense proposed the inference that Beanie framed Kyles. We are not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense. Rather, the jury rejected his defensive theory and viewed the overwhelming incriminating evidence as proof of Kyles' guilt. We are not empowered to substitute our own judgment or sense of fairness for the jury's.

AFFIRMED.

KING, Circuit Judge, dissenting:

With deference to my distinguished and able colleagues in the majority, I dissent from their affirmance of the district court's denial of the writ of habeas corpus. For the first time in my fourteen years on this court – during which I have participated in the decision of literally dozens of capital habeas cases – I have serious reservations about whether the State has sentenced to death the right man. My reservations are directly relevant to the two main constitutional claims that Kyles has raised – an

ineffective-assistance-of-counsel claim[1] and a *Brady* claim.[2] Both claims are governed by a standard that asks whether there is a "reasonable probability" that, but for the constitutional infirmities at trial, "the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (citing *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068). A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Id.*

An exhaustive examination of the entire record in this case was necessary to properly assess my degree of confidence in the verdict. After such a review – of both evidence introduced at trial and the evidence that should have been presented – I conclude that Kyles has shown both that his trial lawyer was constitutionally ineffective and that the State failed to disclose material exculpatory and impeachment evidence. Individually, and particularly when taken together, these two constitutional violations have undermined my confidence in the jury's verdict. Unlike the majority, I believe that, when the constitutional violations in this case are considered, there is by no means "overwhelming evidence" of Kyles' guilt.

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[1] *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[2] *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

I.

What follows is a detailed summary of the facts garnered from the record,[3] paying due deference to the Louisiana Supreme Court's opinion on direct appeal, the state trial court's findings of fact issued in denying Kyles' petition for state habeas relief, and the federal district court's findings of fact issued in denying Kyles' petition for federal habeas relief.[4]

A. Events leading up to trial

At approximately 2:00 p.m. on Thursday, September 20, 1984, Dolores Dye, a sixty year-old white female, finished her shopping at a Schwegmann Bros. grocery store in New Orleans.[5] As she walked to her car in the store's parking lot, she toted a number of bags of groceries and her purse. According to police statements taken from eyewitnesses, after Mrs. Dye placed some or all of her groceries and her purse into the trunk of her red two-door Ford LTD, a young black man approached her and a struggle ensued, apparently over the keys to Mrs. Dye's car. The assailant wrestled her to the ground. When Mrs. Dye screamed and attempted to escape, the robber grabbed her arm, drew a small dark colored revolver from his waistband, and fired it into her left temple,

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[3] Except as specifically noted, all of the evidence discussed herein was adduced and thoroughly explored at the state court post-conviction evidentiary hearing.

[4] *See* 28 U.S.C. § 2254(d); FED.R.CIV.P. 52.

[5] Schwegmann Bros. is a large chain of grocery stores, many of which are located in New Orleans.

killing her instantly.[6] The gunman then took the keys from Mrs. Dye's hand, ran to her car, and drove away.

There were a number of eyewitnesses to the crime. New Orleans police took contemporaneous witness statements from at least six persons, statements which were first provided in connection with the state court postconviction evidentiary hearing.[7] Almost all of the witnesses stated that the murderer was a black man with hair variously described as "platted," "in platts," or "braided," as distinguished from a combed-out "Afro" hair style. Certain discrepancies in the various statements are notable.[8]

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[6] The bullet was later determined to have been fired from a .32 caliber pistol.

[7] Those statements were taken from Edward Williams, Isaac Smallwood, Lionel Plick, Robert Territo, Willie Jones, and Henry Williams. Of those persons, only Smallwood, Territo, and Henry Williams testified at trial.

[8] Isaac Smallwood described Mrs. Dye's assailant as "a black man . . . [about 17 or 18[.] He was dark complexted [sic][.] He had a light moustache, and braided hair. The braids looked like they went down to his shoulders." Lionel Plick described the assailant as being "about in his 20's[.] He was about 5'10" tall, slender build. . . . " Robert Territo similarly described the murderer as "about twenty-eight years old, close to six feet tall, slim build, dark skinned. . . . " Willie Jones described Mrs. Dye's assailant as "a black male, about seventeen or eighteen years old[.] He was about five feet-nine inches tall and weighed about one hundred and forty pounds. He was dark skinned and his hair was platted." Henry Williams described the assailant as "a black male, about 19 or 20 years old, about 5'4" or 5'5", about 140 to 150 lbs., medium build, dark complexion, his hair looks like it was platted, it was short."

New Orleans police had no leads until the following Saturday, September 22, 1984 – two days after the murder – when Joseph "Beanie" Wallace[9] informed police investigators that he could supply them with a valuable lead in the Dye murder regarding a man only identified as "Curtis."[10] Detective Ray Miller and his supervisor, Sergeant James Eaton, met with Wallace at approximately 11:00 p.m. in the same general neighborhood where the murder occurred. In a lengthy tape-recorded conversation[11] that was first made known to the defense during the state court post-conviction proceedings, Wallace told Miller and Eaton that he (Wallace) lived with Curtis' brother-in-law, whom Wallace repeatedly described as his "partner."[12] According to Wallace, on the previous day, Friday, September 21, 1984, he had purchased a red Ford LTD from Curtis for $400 at approximately 6:00 p.m. Wallace stated that Curtis had not confessed to the murder and, in fact, had never even told Wallace that the car was stolen. However, Wallace stated that his relatives had informed him that the local newspapers and television had reported the Dye murder and had also shown pictures of the red Ford. Hence, Wallace stated, this discovery prompted him to contact the police.[13] In response to

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[9] In his conversation with the police, Wallace assumed one of his various aliases, "Joseph Banks."

[10] "Curtis" was later identified as Curtis Lee Kyles.

[11] Wallace was not aware that the conversation was being recorded.

[12] That person was later identified as Johnny Burnes, the brother of Curtis Lee Kyles' common-law wife or girlfriend, "Pinky" Burnes.

[13] In their habeas corpus pleadings, the State has claimed that Wallace had previously served as a police informant;

police questioning, Wallace described Curtis as a tall, "real skinny" black man, approximately twenty-five years old, "with a bush" hair style.[14]

Wallace also claimed that on the same Friday, he, Curtis, and Curtis' brother-in-law had unloaded numerous bags of Schwegmann Bros. groceries and a woman's brown purse from the stolen red car's back seat and trunk. According to Wallace, they then placed the items in the home of Curtis' common-law wife, "Pinky" Burnes, where Curtis frequently stayed.[15] Wallace

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however, the tape-recorded conversation reveals that the New Orleans police not only were unaware of Wallace's true name but also of his criminal history. In response to police questioning, Wallace claimed that he had been arrested only once, for "fighting." In fact, as was revealed at the state court post-conviction hearing, Wallace had been convicted as an accessory to another robbery/murder in New Orleans in the early 1980s. The habeas record also contains a transcript of a police interview with Wallace that was recorded four days after Curtis Lee Kyles was sentenced to death for the murder of Dolores Dye. In that statement, Wallace confesses that he participated in an unrelated 1984 robbery/murder of an elderly woman in her New Orleans home. Wallace admitted that it was his handgun that was used to kill the other woman, but denied that he was the triggerman. Wallace was never prosecuted for his involvement in that murder.

[14] At one point in the conversation, Wallace described Curtis as wearing a "bush" generally; he also specifically described Curtis as wearing a "bush" on the day on which Curtis allegedly sold the car to Wallace. In response to specific police questioning, Wallace also stated that Curtis would sometimes wear his hair in plaits.

[15] At trial, numerous witnesses referred to the relationship as a common-law marriage. Kyles is also the father of five of Pinky Burnes' children. Although he often spent the night at

claimed that they later went to the Schwegmann Bros. parking lot at approximately 9:00 p.m. on Friday in order to retrieve Kyles' automobile, which Wallace described as an orange Ford.[16] Wallace further stated that "I betcha I can get in a lot of trouble with this shit, huh," to which the police officers responded by repeatedly assuring Wallace that he would not be arrested and that, to the contrary, Wallace had done "the right thing." Wallace stated that his fear stemmed from the fact that he had been seen driving Mrs. Dye's car on Friday night through the French Quarter of New Orleans. Wallace also admitted that he had changed the license plates on Mrs. Dye's car.[17] Later in the conversation, Wallace became more confident, reminding the police that "I ain't doing all this for nothing, you know." The police responded by repeatedly promising that Wallace would not lose the $400 that he claimed he paid for the car as a result of the police's confiscation.

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other locations, Kyles spent a substantial portion of his time before his arrest cohabiting with Pinky Burnes at the apartment which she leased.

[16] At trial, there was evidence that Kyles in fact owned a rust-colored Mercury.

[17] Although the State, at trial and afterwards, has consistently disputed that Wallace in fact changed the plates, the tape recording makes it clear that Wallace did change the plates. In response to a question from Detective Miller asking "[y]ou changed the plates on it, huh," Wallace sarcatiscally responded "[y]ou never know." Later in the conversation, Detective Miller repeatedly informed other police officers that "[h]e changed the plate" – statements in which Wallace fully acquiesced. Furthermore, as discussed, *infra*, in a subsequent conversation between Wallace and the chief trial prosecutor, Cliff Strider, Wallace again admitted that he had changed the plates.

Also noteworthy in the tape-recorded conversation was Wallace's eagerness to help the police build a case against Curtis Lee Kyles. Wallace stated that Kyles regularly carried two handguns, a .32 and a .38 caliber. Wallace admonished Detective Miller that *"if you can set him up good,* you can get the same gun" that was used to kill Mrs. Dye. (emphasis added). Wallace also accompanied the police to Schwegmann Bros., where Wallace showed police the location where Curtis had supposedly parked his car, which was not retrieved until the day after the murder, according to Wallace. Wallace specifically pointed out that the car was parked "on the same side where the woman was killed at." He also claimed that Curtis "had a brown pocketbook" or "purse"[18] that he retrieved from the bushes at Schwegmann Bros. Wallace pointed to bushes where Curtis had allegedly retrieved the purse. Wallace claimed that "he's [Curtis] got it . . . at home [in a] chifferrobe [sic]." Wallace informed Sergeant Eaton that Curtis' "garbage goes out tomorrow" and "if [Curtis] is smart he'll put [the purse] in [the] garbage."[19]

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[18] Wallace originally referred to it as "pocketbook" but, when asked by the police, stated that it was in fact a "purse . . . like a purse." I observe that the record contains a photograph of a single brown leather woman's handbag, which was identified as belonging to Mrs. Dye.

[19] On the tape itself, Sergeant Eaton actually makes the statement – quoting Beanie Wallace – in response to a question from Detective Miller. Wallace's actual statement is inaudible due to intense static. Eaton's quoting Wallace, however, is apparent from the tape. Moreover, at the state court post-conviction evidentiary hearing, Eaton testified as follows in response to questions from Kyle's state habeas counsel:

Wallace was then taken to police headquarters where he was again interviewed by New Orleans police, this time by Detective John C. Miller.[20] The written statement, which was not disclosed by the State until the state court post-conviction proceedings, indicates that the interview began at 12:55 a.m., Sunday, September 23, 1984. The statement repeats the essentials given earlier, but one portion, which concerns Wallace's version of events on Friday night, merits full quotation:

> Curtis had called his brother-in-law, Claude Burn[e]s, they call him John. I took a ride with

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Q. Do you have any recollection now as to why you [said] you had reason to believe the victim's [personal effects] would be in the trash?
A. I sure do.
. . . .
Q. What it [sic] that?
A. . . . The subject Detective Miller had interviewed [i.e., Wallace, assuming the alias "Joseph Banks"] see[n] Curtis Kyles with a purse. I had asked him [about] the disposition of the purse, what [did] Curtis do with the purse. . . . He says, "He probably threw it away." . . . He suggested that probably he'd throw it in his garbage. . . .
Q. When you say "he," you mean Beanie?
A. Beanie had suggested that Curtis probably would throw it away in his garbage. I made the statement, to my knowledge, which is transcribed, telling Detective Miller when he asked me what he did say – Detective Miller had removed himself from the car and was searching the area. He [Miller] asked me what did he [Beanie] say, and I said "He said he'd probably throw it in the garbage. . . . "

[20] Detective John C. Miller and Detective Ray Miller are apparently different persons.

> Claude over to Curtis' house on Desire Street. We went inside and Calude [sic] went in the back of the house to talk to Curtis' old lady[,] Pinky [Burnes, Johnny Burnes' sister]. Then he came and we took another ride to Mazant St. That's where Curtis was with the car. . . . [Curtis] was standing next to the car, [and] he asked me if I wanted to buy it and he gave me the keys. See, I was supposed to buy his car, but he said that he wanted to sell me the [red] ford because he was going to give it to his old lady, but he got made at her and wanted to sell it. I was going to give him the four hundred dollars for his car but I like the ford better so he sold me that one. He asked me to help him unload the ford, because he had grocery's in the Schwegmann bags in the trunk and on the back seat. We took the spare tire out and the jack and put it in his car. After we took everything out he took a brown purse out of the ford, from the front seat. He said that it was his old lady's purse. Then I got in the ford and I drove over back to his house on Desire St. [H]e rode with some friends of his to his house and we met on Desire by his house. That's when I helped him unload his car and bring the grocery's inside his house. . . . After that I just left. [sic passim].

Wallace then reiterated his claim that approximately three hours later, at 9:30 p.m. on the same Friday night, Curtis "called his brother-in-law" at the residence "where I stay and I went for the ride. We went to Curtis' house and picked him up and went back to Schwegmann . . . [to] pick up his car, because he said that it didn'[t] want to start. . . . It was in the Schwegmann's parking lot . . . [where] he picked up a pocket book he had by the building. [I]t was a big brown pocket book."

In a third pre-trial interview – between the State's chief trial prosecutor, Cliff Strider, and Wallace – Wallace's version of the events of Friday, September 22, 1984, had changed again.[21] Like the other two statements, this one was not disclosed to the defense until Kyles' conviction and death sentence had become final. Rather than allegedly picking up Curtis Kyles' car from the Schwegmann Bros. parking lot on Friday, Wallace claimed that he, Curtis, Johnny Burnes, and another man (identified as "Black")[22] drove to the supermarket parking lot on *Thursday*, in the early evening.[23] That is, in the third interview, Wallace claimed that they retrieved Kyles' car during the early evening of the same day Mrs. Dye was murdered. Strider's notes then recount that at approximately 7:45 p.m.,[24] the group drove to "Black's house" where Kyles,

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[21] The precise date of this interview is unknown, but apparently it occurred around the time of the two trials in late 1984. it is undisputed that the interview in fact happened. At the state court post-conviction hearing, Kyles' counsel offered into the record the five pages of notes, which were discovered in the New Orleans District Attorney's file and which were identified as having been written by the State's chief trial prosecutor, Cliff Strider.

[22] At trial, one of the defense witnesses was named Kevin Black, who, the prosecution argued, assisted Kyles, Wallace, and Johnny Burnes in retrieving Kyles' car from Schwegmann Bros.

[23] Strider's notes indicate that the group drove to Schwegmann Bros. between 5:00 and 7:30 p.m.

[24] Strider's notes do not specify a.m. or p.m., but presumably refer to 7:45 p.m., as is apparent not only from the context of the notes but also from a reference to the term "dark" written next to "7:30-7:45." Furthermore, Mrs. Dye was not murdered until 2:20 *p.m.* on Thursday.

Black, and Johnny Burnes supposedly left Wallace in the car and proceeded to go inside. Approximately ten minutes later, according to Wallace, the others returned carrying groceries and a brown purse. The group then returned to Pinky Burnes' apartment, where the groceries were unloaded once again. After a night of drinking and smoking marijuana, the group allegedly broke up around midnight.

The next portion of Strider's notes are subtitled "Friday" and begin at "11:00," presumably 11:00 a.m. from the context of the notes. It is then, according to this version of Wallace's statement, that Curtis allegedly sold the red Ford to Wallace. The notes state that Wallace spent the remainder of the day and most of the night driving around New Orleans. Wallace returned to the home at which he was staying at approximately 4:00 a.m. Saturday morning.

The next portion of the notes are subtitled "Saturday" and begin at 10:00 a.m. Wallace recounted that he changed the license plates on the car that morning. By that afternoon, Strider's notes state, "B[eanie] put everything together." He then "called Miss Williams," who was apparently a contact at the New Orleans Police Department. By approximately 9:00 p.m., Wallace met with Detective Ray Miller and Sergeant Eaton – which comports with the contents of the undisclosed tape (discussed *supra*). Strider's notes then refer to the second police interview that ended early Sunday morning, at approximately 2:30 a.m. (discussed *supra*).

The next portion of Strider's notes are subtitled "Sunday" and begin at noon (12:00 p.m.), when the notes

refer to a call from "Miss Williams" to Wallace. Williams "asked about gun – B[eanie] said he will find out – B[eanie] will call back." The notes then state that Wallace went to Pinky Burnes' apartment from approximately 2:00-5:00 p.m. After leaving for approximately two hours, Wallace returned for a "Sunday dinner" at Pinky Burnes' apartment; a number of other persons attended the dinner, including Curtis Kyles and Kevin Black.[25] At approximately 9:30 p.m. on Sunday night, Wallace departed and met with Detective Miller at approximately 10:00 p.m. The two drove around "trying to pass time till [the] garbage [was] put out" at Pinky Burnes' apartment; they "circled road till about 3:00 a.m." As will be discussed in greater detail below, the New Orleans police picked up the garbage before dawn.

Included in the state habeas record are New Orleans Police Department memoranda concerning the seizure of the garbage in front of Pinky Burnes' apartment in the early morning hours on Monday, September 24, 1984.

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[25] Curiously, the State has consistently disputed whether in fact such a "dinner party" took place. However, Strider's handwritten notes support Kyles' claims about the dinner party. Strider's notes state that Wallace recounted that on Sunday, September 23, 1984, Wallace "[w]ent to Pinky's about 7 [o'clock]." The statement recounts that Wallace and various other people, including Kyles and Pinky Burnes, ate dinner. "[A]bout 9:00" Beanie left. I observe that at trial, police Detective John Dillman, who was in charge of the New Orleans Police Department's investigation of the Dye murder, testified under oath that he knew nothing of the defense's claim that Beanie Wallace came to Pinky Burnes' apartment for a Sunday dinner. Assistant DA Strider, who was present during that testimony, said nothing in response to Dillman's answer.

These documents were not disclosed to the defense until the state court post-conviction proceedings. One of those memoranda, from Sergeant James Eaton to Sergeant Dave Morales, states that "[w]e have reason to believe that the victims [sic] personal papers and the Schwegmann's bags will be in the trash." As discussed *supra*, during the original conversation between Wallace and the police, Wallace informed Sergeant Eaton that, "if [Curtis] is smart, he'll put [Mrs. Dye's purse] in the garbage." At the state habeas evidentiary hearing, Sergeant Eaton admitted that the phrase "we have reason to believe" used in the memo specifically referred to Beanie Wallace's "tip" about the garbage. After police seized the garbage, a brown handbag containing various personal effects of Mrs. Dye was discovered in the rubbish, along with numerous Schwegmann Bros. bags.

Curtis Lee Kyles was arrested outside Pinky Burnes' apartment late Monday morning. Police proceeded to execute a search warrant of the residence. They recovered a .32 caliber revolver, which was later determined to be the murder weapon, hidden behind the stove in the kitchen. Police also recovered various types of ammunition, including sixteen .32 caliber shells that were of the same brand as the shells in the pistol. Also recovered was what appeared to be a home-made holster for a pistol in the wardrobe in the bedroom.[26] Under the sink, the police discovered eight Schwegmann Bros. brown paper bags. In a kitchen cabinet, police also seized cans of three popular brands of dog and cat food similar to the brands normally

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[26] This wardrobe possibly was the "chifforobe" to which Wallace referred in his September 22 statement.

purchased by Mrs. Dye (according to the trial testimony of Mrs. Dye's husband). Mrs. Dye's fingerprints were not found on any of the cans of pet food. Kyles' prints were not found on the .32 caliber revolver, the brown handbag, or in or on Mrs. Dye's red Ford LTD. However, Kyles' prints were found on a Schewegmann Bros. small receipt found in the red Ford LTD, although in the process of lifting the fingerprints, chemicals used by the police destroyed the face of the receipt.[27] A second Schwegmann Bros. receipt was also found in the trunk of Mrs. Dye's car, although Kyles' fingerprints were not found on that receipt.

B. The trials

In late November of 1984, Curtis Lee Kyles was put on trial for the capital murder of Dolores Dye. Kyles professed his innocence and supplied an alibi – claiming that he was picking up his children from school – and offered supporting witnesses. The entire theory of the defense was that Joseph "Beanie" Wallace had framed Kyles by planting evidence in Pinky Burnes' apartment and garbage. Wallace's alleged motive was three-fold: first, that Wallace, who admittedly had been seen in possession of the victim's car, wished to shift the blame to Kyles; second, that Wallace had romantic aspirations regarding Kyles' common-law wife, "Pinky" Burnes; and, third, that Wallace wished for reward money. The heart of the State's case was positive eyewitness testimony from

[27] The police failed to record the contents of the printed matter on the receipt.

four persons who were at the scene of the crime, although the State also relied on a number of pieces of circumstantial evidence.[28] Notably, Joseph "Beanie" Wallace did not testify as a witness for either the defense or the prosecution. After four hours of deliberation, Kyles' jury became deadlocked on the question of guilt, and a mistrial was declared.

In early December, a second trial occurred. Again, the heart of the State's case was the unshaken testimony of four eyewitnesses who positively identified Kyles in front of the jury. Again, the theory of the defense was that the eyewitnesses were mistaken in their identification of Kyles. Further, as the Louisiana Supreme Court recounted in its opinion on direct appeal:

> The defense presented several witnesses who saw Wallace in a red car similar to the victim's about an hour after the killing. Other witnesses testified that Wallace had attempted to sell the car shortly after the murder. One witness observed Wallace stooping down near the stove in defendant's home the day before the gun was found behind the stove by the police. There was further testimony that Wallace and defendant resembled each other. Additionally, the defense presented testimony that Wallace was very romantically interested in Martina "Pink[ie]" Burns, defendant's [common-law wife] and the mother of defendant's [five] children.

[28] Police further testified that three of those eyewitnesses had also picked Kyles out of a pre-trial photo line-up.

Finally, defendant took the stand and testified without contradiction that he had no prior convictions. Denying any involvement in the shooting, he explained his fingerprints on the cash register receipt [found in Mrs. Dye's car] by asserting that Wallace had picked him up in a red car [on Friday, September 21, 1984] and had taken him to Schwegmann's, where he purchased transmission fluid for his car and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the package of cigarettes. . . . [29] [T]here was also testimony that defendant's family kept a dog and a cat and often fed stray animals in the neighborhood. On rebuttal, the prosecutor had Wallace brought into the courtroom. Each of the eyewitnesses, after viewing Wallace standing next to defendant, reaffirmed previous identifications of defendant as the murderer.[30]

Kyles, 513 So.2d at 266-67.

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[29] I have been unable to locate the receipt in the record, although the statement of the facts indicates that it was admitted as a State's exhibit at trial. I observe that, at trial, the judge repeatedly referred to the receipt as "a small piece of paper." Furthermore, at oral argument, Kyles' habeas counsel represented to the court – without contradiction by the State – that the receipt was approximately 2" x 2".

[30] The state court neglected to mention that the prosecution also offered a blown-up photograph taken at the crime scene soon after the murder. Prosecutors argued that a medium to dark colored automobile in the background of the photograph was Kyles' own car. Prosecutors repeatedly argued during cross-examination of defense witnesses that Kyles had left his own car at Schwegmann Bros. on the day of the murder and had retrieved it later. The prosecution offered no evidence or witnesses to support this argument besides the blown-up photograph.

Once again, Wallace did not testify for either the State or defense.

C. Evidence that has subsequently come to light

During the state court post-conviction evidentiary hearing. Kyles' able habeas counsel, who replaced the defense attorney who had handled the trial and direct appeal, offered a number of items of new evidence that were discovered in the files of the New Orleans police and District Attorney's Office. It is undisputed that this evidence was not made available to the defense at the time of trial. Such evidence may be summarized as follows:

i) Six contemporaneous eyewitness statements taken by police following the murder (discussed *supra*);

ii) A tape recording of the lengthy conversation between Wallace and New Orleans police officers that occurred late in the evening on Saturday, September 22, 1984 (discussed *supra*);

iii) A typed and signed statement given by Wallace to another New Orleans police detective early in the morning of Sunday, September 23, 1984 (discussed *supra*);

iv) Hand-written notes of an interview of Joseph "Beanie" Wallace conducted by Cliff Strider, the chief trial prosecutor (discussed *supra*); and

v) A computer print-out of license plate numbers on cars parked in the Schwegmann Bros. parking lot recorded by New Orleans

police at approximately 9:15 p.m. on September 20, 1984, the night of the murder.[31]

In support of Kyles' *Brady* claim,[32] Kyles' state habeas counsel offered a copy of the lengthy pre-trial motion filed by Kyles' trial counsel, who requested that the State disclose any exculpatory or impeachment evidence. Witness statements were among Kyles' requests. In its response to that motion, the prosecution based its denial on the claim that there was "[n]o exculpatory evidence."

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[31] Another item of somewhat less significance was revealed at the state court post-conviction evidentiary hearing – a copy of an internal New Orleans police memorandum dated "9-20-84" (i.e., Thursday, the same day as the murder). The memo states that a New Orleans citizen who had apparently heard about the murder reported that, at approximately 7:00 p.m., a "bright red 1980-1983 Thunderbird" in the French Quarter drove into a parking meter and then swerved away. (Mrs. Dye's car was a bright red 1980 Ford LTD, which strongly resembles a Thunderbird; indeed, as discussed *infra*, at least one of the eyewitnesses to the murder originally described Mrs. Dye's car as a Thunderbird.) The citizen described the driver as "a negro male, 25 years of age, 5'10"-5'11" with short hair." The driver stopped and asked the citizen if he wanted a ride, which was declined. The citizen observed a "small bluesteel [i.e., dark metal, as opposed to nickel] revolver on the seat." Notably, in his various statements to police, Beanie Wallace admitted driving Mrs. Dye's car around New Orleans, including the French Quarter, although he claimed on Friday rather than on Thursday night. Wallace also stated that at one point that weekend he "pulled out and hit [a] fence – scratched on the passenger side." As discussed *infra*, Wallace's chronology of events between Thursday and Sunday significantly changed in each of his various statements given to police.

[32] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

II.

On appeal from the district court's denial of the writ of habeas corpus, Kyles raises two main claims: the aforementioned *Brady* claim and a somewhat related ineffective-assistance-of-counsel claim. I will address these two issues in turn. However, because the critical issue of "materiality" in this court's *Brady* analysis is governed by standard identical to that governing the "prejudice" prong of the two-prong ineffectiveness analysis required by *Strickland v. Washington*,[33] I will address the *Brady* "materiality" and *Strickland* "prejudice" issues together after separately analyzing the first prongs of the *Strickland* and *Brady* standards.[34]

A. *Strickland*' first prong: Was trial counsel deficient?

Under *Strickland v. Washington*, in order to prevail in raising a claim of ineffective assistance of counsel, a criminal defendant must make two separate showings:

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[33] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[34] *Compare United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."), *with Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

first, that counsel was "deficient," that is, that counsel did not provide "reasonable effective assistance"; and, second, that trial counsel's deficient performance "prejudiced" the defendant. *See id.* 466 U.S. at 687-98, 104 S.Ct. at 2064-70. As noted, I will limit my discussion here to the first prong of *Strickland*.

Of all Kyles' specific allegations of ineffective assistance on the part of his solo trial counsel, Martin Regan, I believe that counsel was deficient in only one way, albeit a particularly important way: Regan not only failed to call Joseph "Beanie" Wallace as a defense witness, but even failed to interview him. At the state court post-conviction evidentiary hearing, Regan repeatedly testified that the only reason he failed to call "Beanie" Wallace to the stand at trial or even interview him was because Regan mistakenly believed that, under Louisiana evidence law, he would have had to vouch for Wallace's credibility – and thus could not impeach Wallace or ask him leading questions – unless Regan could show *both* surprise *and* hostility on Wallace's part. With respect to this claim, the state trial judge found that:

> Much has been made of Mr. Regan's opinion that he failed miserably in his defense of Mr. Kyles when he chose not to call Joseph Wallace as a witness. Mr. Regan stated that he incorrectly viewed the law as saying that if Joseph Wallace was called as a [defense] witness he would have had to vouch for his credibility unless he could have shown hostility and surprise on the part of Mr. Wallace at the time that Mr. Wallace testified. *This was the law of Louisiana at the time of both Mr. Kyles' trials. . . .* The law of Louisiana has subsequently been amended

> *. . . But at the time of Mr. Kyles' trial, under existing law, Defense counsel certainly made an intelligent and strategically correct decision not placing Mr. Wallace on the stand as a defense witness.* (emphasis added).

The federal district court agreed that Regan's failure to call Wallace was a reasonable strategic decision in view of Louisiana law as it then existed.[35] I reject the conclusions of both the state trial court and federal district court. As I discuss below, I accept instead the conclusion of the Louisiana Supreme Court.

At the time of trial, the plain language of the applicable state evidence rule was as follows: "No one can impeach his own witness, unless he had been taken by surprise by the testimony of such witness *or* unless the witness shows hostility toward him, and even then, the impeachment must be limited to evidence of prior contradictory statements." LOUISIANA REVISED STATUTES 15:487 (emphasis added). Thus, as a matter of state law, the state trial court was mistaken. With respect to the federal district court's additional conclusion that Regan made a "strategic" choice not to put Beanie Wallace on the stand

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[35] The district court disagreed with the state trial court's conclusion that *both* hostility and surprise were required. However, the district court questioned whether Wallace would have been a "hostile" witness under Louisiana law. The district court based this conclusion on the testimony of Cliff Strider, the chief trial prosecutor, who testified at the state court post-conviction evidentiary hearing that "I told him [Regan] that I didn't think Beanie would get hostile. I didn't think Beanie would be upset." Thus, the district court held, "this court believes that Regan made a tactical decision that was reasonable and well advised at the time that he decided not to place Beanie on the stand."

on the ground that he likely would not prove to be "hostile," I would reject this finding as clearly erroneous.

My basis for rejecting the federal district court's finding is the opinion of the Louisiana Supreme Court in *State v. Kyles*, 513 So.2d at 273: "Wallace was clearly a witness hostile to the defendant, and defense counsel was entitled to employ leading questions and to impeach the witness through any prior inconsistent statements. . . . Defendant's argument that he would have been required to show both hostility *and* surprise is clearly wrong."[36] In reliance on the opinion of the highest expositor of state law in Louisiana, I believe that Regan was deficient in failing to call Wallace to the stand because of a "clear" misunderstanding of a single, basic rule of evidence. Regan's *entire* strategy at trial was to argue that Wallace framed Kyles; his failure to call Wallace, who was present at trail and available to testify, was anything but "strategic."

The majority, agreeing in part with the district court, holds that Kyles' trial counsel made a "strategic" choice not to call Wallace to testify (or even interview him) because Wallace was a potential "loose cannon" whose

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[36] In making these observations, the state high court was not addressing a claim of ineffective assistance of counsel. Rather, on direct appeal, Regan (who remained Kyles' counsel until his conviction was affirmed) raised an unrelated claim in which he coincidentally displayed his misunderstanding of Louisiana evidence law on the issue of hostile witnesses called by a party. The Louisiana Supreme Court, in rejecting that claim, noted Regan's "clear" misunderstanding of the law. The Louisiana Supreme Court's conclusion applies just as forcefully to the ineffectiveness claim.

testimony would have been a "double-edged sword" because Wallace "almost certainly would have inculpated Kyles." Majority Opinion at 818-19. Thus, the majority reasons, trial counsel was not deficient under *Strickland*. I can only respond by agreeing with the majority that I have no doubt that Wallace would have attempted to inculpate Kyles. But that is of no moment. The entire purpose of calling Wallace would have been to expose his leading role in the development of the prosecution's case, to impeach him and, in the process, to accuse him of framing Kyles and suggest that Wallace had some role in the murder. One would hardly expect Wallace not to have attempted to inculpate Kyles. The majority simply misses the point.

B. The *Brady* claim: Suppression and Favorableness?

A *Brady* violation occurs where: (1) the government suppressed evidence; (2) the evidence was "favorable" to the defendant; and (3) the evidence was "material" to issues at trial. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *Bagley, supra; United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Brady, supra*. Favorable evidence includes both exculpatory and impeachment material. *Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380. The *Brady* doctrine applies equally to situations where a specific request, general request, or no request is made by the defense for particular favorable information. *Id.* at 682, 105 S.Ct. at 3383; *see also Kirkpatrick v. Whitley*, 992 F.2d 491 (5th Cir.1993). Furthermore, the *Brady* materiality standard applies equally to undisclosed evidence relating to the guilt/innocence and

punishment stages of trial, *see Brady*, 373 U.S. 83, 83 S.Ct. 1194, including in capital cases, *James v. Whitley*, 926 F.2d 1433, 1437 (5th Cir. 1991).

After an evidentiary hearing at which the defense offered all of the above-mentioned items of evidence that were not disclosed at trial, the state trial court, in its findings of fact and conclusions of law, rejected Kyles' *Brady* claim:

> The Court finds no merit to [sic] any of the Defense allegations . . . regarding violations of Brady versus Maryland. . . . Assuming, arguendo, that certain background information concerning and statements of Joseph Wallace were withheld by the State[,] this Court finds that this [was] not ultimately prejudicial to the Defense. The Court concludes that none of the evidence would have ultimately assisted the Defense to any significant degree in this case. It is important to note that Joseph Wallace was never called as a witness by the State. As such, there never could be an attempt by the defense to attack the character and credibility of Mr. Wallace. Hence, the State never sought to vouch for the credibility of Mr. Wallace. As such, there would be no basis for the attempted impeachment of Mr. Wallace by the Defense. It should be further noted that the Defendant was given ample opportunity, and successfully placed before the jury through credible evidence, the basic premise of the Defense's case, that Joseph Wallace was in fact the killer of Mrs. Dye and that Joseph Wallace "framed" the defendant for [sic] this killing. The Defense even went so far as to present evidence of possible bias and

> motive[,] i.e., Wallace's desire to gain the affection of Curtis Kyles' female acquaintance – by having Kyles convicted of this crime and thereafter incarcerated. The jury was more than adequately exposed to the possibility that Joseph Wallace was in fact the killer. They were aware that he was in fact in possession of the victim's car shortly after her murder. The jury was likewise given the opportunity to see Mr. Wallace in person as he was brought into open court at the behest of the State. He was made to literally stand before the jury. At the same time the jury was afforded the opportunity to compare his height, his size, his physical characteristics to those of the defendant. . . . This Court finds that the new evidence . . . , even if presented to another jury, would not in any way lead to a different outcome of this case.[37]

The federal district court likewise rejected Kyles' *Brady* claim. The court held that none of the alleged *Brady* evidence even met the second prong of the *Brady* test – that is, that such evidence be "favorable" to the defense on the issues of guilt or punishment. The September 22, 1984 tape-recorded conversation between Wallace and New Orleans police, according to the district court, "does not exculpate Kyles." The court also stated that Kyles'

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[37] The state trial court failed to address many particulars of Kyles' multi-faceted *Brady* claim, which were raised either in Kyles' state habeas petition or at the extensive state post-conviction evidentiary hearing. *See infra*. The Louisiana Supreme Court, by a vote of five to two, affirmed the trial court's denial of habeas relief.

characterization of the contents of the tape "is not a fair rendition of the material contained in the tape itself."[38]

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[38] In reaching this conclusion, the court noted, "Kyles alleges that had he had the tape recording he would have learned that:

1) Beanie knew in what area of Schwegmann's parking lot the murder was committed;
2) Beanie had said that Kyles wore a 'bush' hairstyle in contrast to testimony that the killer had 'plaits';
3) Beanie asked for $400 for the purchase price of the victim's car and was assured by police that he would be paid;
4) Beanie suggested to police that Kyles might put incriminating evidence in his garbage; and
5) Beanie feared apprehension because he had been seen driving the Dye automobile."

I reject the district court's conclusion that Kyles' "characterization" of the contents of the tape "is not a fair rendition of the material contained in the tape itself." I have repeatedly listened to the tape, have compared it to the transcript of the recording offered by Kyles' counsel, and agree with Kyles' characterization regarding each of the above five points. The characterization of whether certain undisclosed evidence is "favorable" to the defense (a prerequisite to a finding of "materiality" under *Brady*) is a mixed question of fact and law, which is reviewed de novo on appeal, rather than a pure factual finding. *See United States v. Rogers*, 960 F.2d 1501, 1510 (10th Cir.1992) (citing cases); *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir.1991); *United States v. Rivalta*, 925 F.2d 596, 598 (2d Cir.1991). Thus, the district court's legal conclusion is owed no deference and is reviewed de novo on appeal. Even assuming that the district court's conclusion regarding Kyles' "characterization" of the contents of the tape recording were a "pure" finding of fact, I would reject that finding as clearly erroneous. Finally, I observe that the majority does not appear to dispute Kyles' characterization of the contents of the tape recording.

With respect to the police's computer print-out of the license numbers in Schwegmann's parking lot on the night of the murder, the district court held that because a New Orleans police officer had testified at the state court evidentiary hearing that the list was incomplete, the list "would have carried little if any exculpatory weight and bears so little on materiality that it fails to fit the *Brady* mold." With respect to the police memoranda regarding the garbage collection, the court stated that even if Beanie were the source of the tip about the garbage, "the bags that were picked up were identical, which renders improbable, if not impossible, the defense's argument that Beanie planted a bag of garbage." Regarding Smallwood's inconsistent witness statement, the district court conceded that Smallwood's trial testimony appeared "embellished," but summarily held that there was no "prejudicial error." After stating that "[a] complete reading of the record convinces this court of Kyles' guilt and that he received a fair trial," the district court rejected Kyles' *Brady* arguments.

On appeal, Kyles once again advances his *Brady* claim. Kyles points to: i) Beanie's various undisclosed contradictory statements; ii) Isaac Smallwood's contemporaneous witness statement that conflicted with his trial testimony; iii) the computer print-out of license plate numbers; and iv) the police internal memoranda regarding the seizure of garbage.

As an initial matter, I address the contention that has been made by the state trial court judge and the State pertaining to the fact that the trial prosecutors – as opposed to the New Orleans police – may not have been aware of some of this evidence at the time of trial. If this

were indeed true,[39] it would nevertheless be irrelevant. The *Brady* doctrine is not limited to prosecutors; rather, it includes *all* members of the "prosecution team," which includes all law enforcement officers who have worked on the case and thereby contributed to the prosecutorial effort. *See Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir.1977) ("The petitioner . . . allege[s] that Nicholson was a state law enforcement officer. As such, he was a member of the prosecution team."); *see also United States v. Buchanan*, 891 F.2d 1436, 1442-43 (10th Cir.1989) (citing

[39] I find the State's claim that the various items in the police file were not even made available to the prosecution until long after trial to be highly implausible; indeed, the State's claim here suggests that the State is not being candid with the court. The State has claimed that the various statements of the eyewitnesses, the three statements of Beanie Wallace, and the police memoranda were not available – to the prosecution *or* defense – until long after trial because of "slow typing" by police typists. *See* State's Brief, at p. 29. The claim was repeated at oral argument. However, the very documents that supposedly were typed long after the fact entirely belie the State's claim. All of the contemporaneous eyewitness statements, which were typed, were *signed and dated* by the various eyewitnesses in the immediate wake of the murder. Likewise, Beanie Wallace's second statement, which was typed, was *signed and dated* by Wallace on September 23, 1984 – three days after the murder. I simply cannot accept the proposition these various typed documents were back-dated and signed after trial. Furthermore, Beanie Wallace's third statement, which was memorialized in Assistant DA Strider's notes, obviously was available before trial. And, finally, the original tape-recorded statement, which was never reduced to a hard copy until it was disclosed to the defense during the post-conviction proceedings, clearly was available, as it was on tape. The State's claim that the tape was never listened to by the prosecution, while irrelevant, is likewise implausible.

cases); *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir.1989) (citing cases); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir.1985). In a similar vein, the good faith or bad faith of the prosecution has no bearing on the due process required by *Brady*. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196. Accordingly, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972).

That said, I agree with Kyles that all of these items of undisclosed evidence, particularly when considered cumulatively, would have been "favorable" to the defense at trial within the meaning of *Brady*. The state trial court, whose opinion was affirmed by the Louisiana Supreme Court, and the federal district court concluded that the evidence was not favorable because of the supposedly overwhelming evidence of Kyles' guilt. I disagree. Much of the *Brady* evidence in this case substantially detracts from the State's evidence and theories at trial. The undisclosed evidence, as Kyles correctly argues, "fits hand in glove" with his theory of the defense advanced at trial. Moreover, two of the undisclosed items – contemporaneous witness statements by Isaac Smallwood and Henry Williams – go to the reliability of the critical eyewitness testimony at trial. Rather than further addressing here how each item of undisclosed evidence would have been "favorable," I necessarily will address that question in Part II.C., *infra*, in discussing the larger issue of materiality.[40]

[40] The majority opinion, unlike the district court and state courts, agrees that at least Beanie Wallace's tip to police about

C. *Brady* "Materiality" and *Strickland* "Prejudice"

Having determined both that Kyles' trial counsel was deficient by failing to call Beanie Wallace as a defense witness and that a considerable amount of evidence was both suppressed by the State and favorable to the defense, I next jointly determine: i) whether the evidence was "material" under *Bagley;* and ii) whether trial counsel's deficiency "prejudiced" Kyles under *Strickland.* I believe that the only appropriate way to analyze Kyles' case is to consider his ineffectiveness and *Brady* claims in conjunction. After all, the "materiality" prong of his *Brady* claim in a significant way directly relates to the "prejudice" prong of his ineffectiveness claim, and vice versa. Furthermore, as noted *supra,* the inquiry for both claims is identical: assuming, counter-factually, that Wallace had in fact been called as a defense witness and that trial counsel had been privy to all of the aforementioned *Brady* evidence, it must be asked whether there is a "reasonable probability" that the result of the guilt/innocence phase or punishment phase would have been different. A "reasonable probability" is one that "undermines confidence in the outcome." *Bagley,* 473 U.S. at 682, 105 S.Ct. at 3383; *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.[41] The

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the garbage, discussed *infra;* was favorable. However, the majority holds that the totality of the *Brady* evidence, including Wallace's garbage tip, was not "material." As I discuss *infra,* I disagree with the majority on the question of *Brady* materiality.

[41] I note here that the majority opinion repeatedly speaks of applying the "harmless error" rule to Kyles' *Brady* claims. The majority seems unaware that *Brady's* progeny, in particular *Bagley,* have their own built-in test of "materiality" to determine whether any *Brady* violation was "harmful" to the defendant –

majority believes that there is no need even to engage in this joint *Bagley/Strickland* analysis because the majority holds that Kyles' trial counsel was not deficient for failing to call Wallace to the stand. *See* Majority Opinion at 815 n. 10.

ii) Why my confidence in Kyles' guilty verdict and death sentence is undermined

Under *Strickland* and *Bagley,* this court must determine whether there is a "reasonable probability" that, but for the two constitutional errors working in conjunction, Kyles' jury, considering all of the relevant evidence, would not have unanimously found either that there was sufficient evidence to prove beyond a reasonable doubt that Kyles was guilty or that Kyles should receive a death sentence.[42] The heart of the inquiry here is whether the

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namely, whether the undisclosed evidence undermines confidence in the verdict. I thus see no need to respond to the majority's rather curious claim that any *Brady* violation was harmless under *Brecht v. Abrahamson,* ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

[42] Under Louisiana law, a single holdout juror during the punishment phase would have automatically resulted in a life sentence for Kyles. *See State v. Loyd,* 459 So.2d 498, 503 (La.1984) (as long as a single juror held out and voted for a life sentence, automatic life sentence under Louisiana law); *see also* LaCode Crim.Pro. 905.8. Although residual doubt is not a species of constitutionally relevant mitigating evidence, *see Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), there is no question that residual doubt plays a significant role in leading a jury to impose a life sentence, *see Lockhart v. McCree,* 476 U.S. 162, 181, 106 S.Ct. 1758, 1769, 90 L.Ed.2d 137 (1986) ("[A]s several courts have observed, jurors who decide both

constitutional infirmities rendered the proceeding *unreliable*. *See Lockhart v. Fretwell*, ___ U.S. ___, ___ - ___, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993).[43] Looking at the totality of evidence in this case – both that admitted at trial and that which should have been introduced – my confidence in the jury's guilty verdict and death sentence is undermined. *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383; *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

In this section, I focus on five main factors that undermine my confidence in Kyles' guilty verdict and death sentence. They may be summarized as follows:

> (i) Kyles' first jury, hearing evidence essentially identical to that offered at the second trial, was deadlocked on the question of guilt;

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guilt and penalty are likely to form residual doubts or 'whimsical doubts' . . . about the evidence so as to decide against the death penalty. *Such residual doubt has been recognized as an extremely effective argument against the death penalty.*") (citations and internal quotations omitted) (emphasis added). Kyles' trial counsel accordingly argued that Kyles' sentencing jury should consider their residual doubt in assessing punishment. In this regard, it is noteworthy that Kyles did not have any other aggravating factors supporting the imposition of a death verdict besides the fact that the murder for which he was convicted was committed in the course of a robbery. And, finally, I note that Kyles lacked a significant prior criminal history, which is important mitigating evidence. *See Kyles v. State*, 513 So.2d at 276. The majority incorrectly states that Kyles had no mitigating evidence "other than his close relationships with his family." Majority Opinion at 811-12.

[43] Although *Lockhart* was an ineffectiveness case, its emphasis on reliability is equally applicable to *Brady* claims in view of *Bagley's* wholesale adoption of *Strickland's* "prejudice" requirement.

> (ii) Beanie Wallace's various statements not only reveal numerous material inconsistencies that suggest that the State's informant was not credible, but also are directly exculpatory in numerous ways;
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> (iii) the undisclosed contemporaneous witness statements not only undermine the eyewitness testimony at trial, but also contain information that suggests that Kyles was not the killer;
>
> (iv) the remainder of the *Brady* evidence is significant; and
>
> (v) the remainder of the State's case not only fails to support the prosecution's theory, but in fact bolsters the defense's theory.

My focus on these factors, particularly (ii)-(iv), chiefly concerns how a reasonably effective trial counsel would have used the *Brady* evidence had it been properly disclosed by the State. My analysis assumes that trial counsel would have utilized such evidence to support the theory of the defense at Kyles' actual trial: namely, that Curtis Lee Kyles had nothing to do with Mrs. Dye's murder and that the eyewitnesses were mistaken or being untruthful; that Beanie Wallace "framed" Kyles not only by falsely informing police that Kyles had sold Mrs. Dye's car to Beanie and that Kyles had retrieved his own car from the Schwegmann Bros. parking lot after the murder, but also by planting various pieces of incriminating evidence at Pinky Burnes' apartment; and, finally, that Wallace himself possibly had some role in the Dye murder.

As an initial matter, unlike the majority I assume here that, had Wallace been interviewed by Kyles' trial counsel, counsel would have called Wallace as a defense witness at trial and attempted to have Wallace explain his various statements given to the State before trial. This scenario assumes that Wallace would have agreed to testify and would not have invoked his Fifth Amendment right to avoid self-incrimination. The State has never suggested that Wallace would have done so, perhaps because there is a serious question about whether Wallace could have effectively made a "blanket" invocation of the Fifth Amendment. *See State v. Smith*, 573 So.2d 1233, 1236 (La.App.1991); *State v. Boyd*, 548 So.2d 1265, 1268-69 (La.App.1989).[44] Assuming that Wallace had invoked the Fifth Amendment in whole or in part, Wallace's invocation would have presented Kyles with valuable ammunition supporting the theory of the defense. Why, Kyles' trial counsel could have argued to the jury, did the State's informant invoke the Fifth Amendment in a case in which he was supposedly only a "good citizen"?

Furthermore, assuming that Wallace had invoked the Fifth Amendment in whole or in part, Kyles' trial counsel

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[44] Although obviously Wallace could have invoked the Fifth Amendment regarding certain questions (e.g., how Wallace knew the location of the murder in the Schwegmann Bros. parking lot), other lines of defense questioning would have been proper and not potentially incriminating (e.g., asking Wallace to explain the various inconsistencies in his statements). I also observe that the trial judge would have had discretion to permit the defense to ask Wallace potentially incriminating questions in front of the jury. *See State v. Edwards*, 419 So.2d 881 (La.1982).

would nevertheless have been able to utilize the various *Brady* evidence regarding Wallace.[45] Much, if not all, of Wallace's various inconsistent statements would have likely been admissible in other ways. For instance, by calling the various New Orleans police who worked with Wallace (or possibly even prosecutor Cliff Strider) as hostile defense witnesses and questioning them about their meetings with Wallace and about the information available to them during the investigation – rather than whether such information was in fact true – a great deal of Wallace's statements could have been introduced as non-hearsay under Louisiana evidence law in operation at the time of Kyles' trial. Finally, simply by proffering Wallace's various inconsistencies – rather than arguing that any of them were in fact true – the defense could have offered the statements as non-hearsay under Louisiana evidence law. *See State v. Hennigan*, 404 So.2d 222, 228-29 (La.1981) ("[E]vidence is not hearsay when offered to prove only that it occurred . . . or that a conversation took place.").[46]

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[45] The remainder of the *Brady* evidence – such as the police memoranda – would have been admissible and highly relevant standing on its own, irrespective of whether Wallace had been called as a witness.

[46] A competent trial counsel could have laid the proper evidentiary foundation for introducing Wallace's various statements by first questioning police officers such as Detective Dillman about the New Orleans Police Department's basis for suspecting that Kyles was the murderer and why the police believed that incriminating evidence would be inside Pinky Burnes' apartment and in her garbage.

I also observe that all of the *Brady* evidence would have directly supported the actual evidence and testimony presented by the defense at Kyles' trial – a theory of the defense that provoked a hung jury on its own without the *Brady* evidence. As I discuss below, information gleaned from Wallace's various statements – such as his admissions that he indeed possessed Mrs. Dye's car shortly after the murder, that he changed its license plates, and that he was actually present at the "Sunday dinner" at Pinky Burnes' apartment on the Sunday after the murder – would have bolstered the credibility of key defense witnesses.

a) The deadlocked jury at Kyles' first trial

The majority, echoing the district court, states that Kyles "faces overwhelming evidence of guilt," a conclusion which dictates the majority and district court's rejection of Kyles' ineffectiveness and *Brady* claims. That is, the majority reasons that Kyles could not have been prejudiced because the result of the proceeding would have been the same whether or not the constitutional errors occurred. If indeed that were true, then why did Kyles' first jury trial, which occurred immediately before the second trial and which involved essentially the same evidence and prosecution and defense theories, end in a mistrial because of a deadlock on the question of guilt? The theory of the defense – even without all of the critical evidence withheld and without Wallace's testimony – was obviously not as weak as has been claimed. *See Stano v. Dugger*, 901 F.2d 898, 903 (11th Cir.1990) (en banc) (in finding a *Brady* violation, the court pointed out that a

deadlocked jury had caused mistrial at defendant's prior trial).

As the Supreme Court has repeatedly observed, appellate judges are presented with only a "cold record" from which to evaluate the proceedings that transpired below. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1039-40, 104 S.Ct. 2885, 2893, 81 L.Ed.2d 847 (1984). In most cases, we cannot accurately assess the credibility of witnesses and the plausibility of counsel's arguments based on the evidence merely from reading the statement of the facts. We are not aware of such important subtleties as a witness's demeanor or trial counsel's apparent sincerity (or lack thereof). In this regard, the fact that one or more jurors at Kyles' first trial were not convinced beyond a reasonable doubt of his guilt is significant in assessing the force of Kyles' case or, alternatively, the weaknesses in the State's case.

b) "Beanie" Wallace's various undisclosed statements

Of all of the *Brady* evidence, I consider Beanie Wallace's undisclosed statements to be the most significant. First, the statements reveal that the State's informant, who was crucial to the State's ability to finger Kyles in the first place, was an incessant liar and schemer who appeared anxious to see Curtis Lee Kyles arrested for the murder of Delores Dye. Second, the statements contain significant exculpatory evidence. I first note the significant contradictions in his various statements.

1) Contradictions

Wallace's September 22, 1984 (Saturday) oral statement[47] to New Orleans police consisted of the following chronology: on the prior Friday, at approximately 6:00 p.m., Kyles sold Mrs. Dye's red Ford to Wallace; at 9:00 p.m., Wallace, Kyles' brother-in-law, and Kyles drove to the Schwegmann Bros. parking lot to retrieve Kyles' car; while at the supermarket, Kyles also retrieved a large brown woman's purse form nearby bushes. Wallace's September 23, 1984 (Sunday) written statement to police consisted of the following chronology: on the prior Friday, at approximately 6:00 p.m., Kyles sold the red Ford to Wallace at some location on Mazant Street in New Orleans; after the purchase, Wallace, Kyles, and Kyles' brother-in-law unloaded bags of Schwegmann Bros. groceries and a brown purse from the red Ford's trunk and back seat and placed them in Kyles' car; the three then drove to Pinky Burnes' apartment, where the groceries were unloaded; at approximately 9:00 p.m., Wallace, Kyles, and Kyles' brother-in-law drove to Schwegmann Bros. to retrieve Kyles' car; at Schwegmann Bros., Kyles also retrieved a "big brown pocketbook he had by the building."

In Wallace's final oral statement, memorialized in the handwritten notes of the chief trial prosecutor, Cliff Strider, Wallace recounted the following chronology: on

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[47] It is noteworthy that in making this first statement Wallace assumed the alias "Joseph Banks" and was not forthcoming about his criminal record, namely a conviction of being an accessory to a murder, and instead claimed that he had been convicted only for "fighting."

Thursday, September 20, 1984, in the early evening, sometime after 5:00 p.m., Wallace, Kyles, Kyles' brother-in-law, and Kevin Black drove from Pinky Burnes' apartment in the brother-in-law's care to Schwegmann Bros., where they retrieved Kyles' car; the four thereafter returned to Pinky Burnes' apartment; at approximately 7:30-7:45 p.m., the four then drove to Black's residence, where they retrieved bags of Schwegmann Bros. groceries and a brown purse; the four then returned to Pinky Burnes' apartment, where the Schwegmann Bros. bagged groceries and the brown purse were taken into the apartment; the next day, Friday, in the early afternoon, Kyles drove Wallace to Black's house where Wallace purchased Mrs. Dye's stolen red Ford; Wallace drove the red Ford around New Orleans with a friend, Ronald Gorman,[48] until early Saturday morning; on Saturday afternoon, Wallace changed the license plates on the car and then discovered that the car had been stolen from Mrs. Dye; thereafter, Wallace contacted police on Saturday night.

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[48] Gorman was a defense witness at trial, who testified that Wallace, wearing his hair in braids, possessed the red Ford on the day of the murder and attempted to sell it to Gorman.

I further note that included in the habeas record is an undisclosed transcript of a conversation between New Orleans Police Detective Pascal Saladino, who worked on the Dye case, and Gorman. The transcript is dated November 28, 1984, which was in the interim between Kyles' first and second trial. Towards the end of the statement, Gorman told Saladino that Beanie Wallace had threatened to kill Gorman if he testified on behalf of Kyles (and, thus, against Wallace) at the second trial. The transcript was first introduced into the record at the state habeas evidentiary hearing.

Unlike the majority, I believe that it is obvious that these three statements contain significant inconsistencies that would have been extremely valuable to the defense. In particular, the various inconsistencies would have permitted jurors to infer that Wallace was an opportunist and liar. The changes in the dates and times of when he was sold the car, when the groceries were retrieved, and when Kyles' car was allegedly retrieved from the Schwegman Bros. parking lot – statements given within a day or two after the alleged events – would have painted a compelling picture of someone who was lying to police or at least one who knew much more than he was telling the police. A jury could reasonably conclude that Wallace was spinning an elaborate web of lies, thus discrediting a significant portion of the prosecution's theory of the case.[49]

The majority greatly discounts the significance of evidence of Wallace's scheming to have Kyles arrested for Mrs. Dye's murder. The majority argues that because the

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[49] Especially noteworthy is Wallace's claim in his September 23, 1984 statement to police that, at approximately 6:00 p.m. on Friday, September 21, Kyles, Kyles' brother-in-law, and Wallace moved the groceries from the stolen red Ford to *Kyles' own car.* The, Wallace claimed, three hours later, Kyles requested that Wallace and Kyles' brother-in-law drive Kyles to Schwegmann Bros. in order to retrieve *Kyles' own car.* This asks one to believe that on the day after the murder Kyles returned to the murder scene and left his car that had not been parked there previously. Furthermore, these claims take on particular relevance in view of the State's attempt to prove at trial – using a blurry, blown-up police photograph – the Kyles' car was parked at the murder scene on Thursday afternoon immediately following the murder.

theory of the defense at trial was that Beanie framed Kyles, the "new" evidence would have only been "cumulative." *See* Majority Opinion at 814-15. The majority's reasoning here assumes that the jury would have had no more reason to believe the defense's theory if the various undisclosed evidence had been introduced. As the majority correctly observes, the first line of defense at both of Kyles' trials was that Beanie Wallace framed Kyles and possibly that Wallace was in fact somehow involved in the murder. That defense was supported by relatively weak evidence at trial – testimony of Kyles' friends and family. The undisclosed evidence, in particular Wallace's own words, would have greatly bolstered the theory of the defense. The *Brady* evidence in this case would have afforded the defense the opportunity to argue forcefully that Wallace framed Kyles and that perhaps Wallace himself had some role in the murder.[50]

2) Potentially exculpatory material

Wallace's statements are also significant in that they contain direct or indirect exculpatory material. There are

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[50] I note that at trial there was no direct evidence of just how Kyles became the New Orleans Police Department's leading suspect in the Dye murder. The State never called Wallace as a witness and no policemen were called to testify about Wallace's involvement in the investigation. Rather, it was apparently assumed in the respective theories of the prosecution and defense during the trial that Wallace had some role in the murder investigation. Thus, the jury likely was not aware of the significance of Wallace's role and could only infer that Wallace must have had some role in the police effort based on the defense claims that Wallace was in possession of Mrs. Dye's car.

numerous statements made in the September 21, 1984 (Saturday) tape-recorded conversation that are notable in this regard. First, Wallace twice made a significant admission: he changed the license plates on the stolen red Ford. As Kyles argues, this action casts into doubt the State's claim that Wallace was simply an unwitting *bona fide* purchaser of a stolen automobile.[51] It also would have corroborated trial testimony of Johnny Burnes, Wallace's self-styled "partner," who testified (under attack from the prosecution) that he witnessed Wallace changing the plates on a red car on the day of the murder.[52] Burnes

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[51] I observe that at trial Detective John Dillman, who headed the New Orleans Police Department's investigation into Mrs. Dyes' murder, was squarely asked by Kyles' trial counsel, "[a]re you aware that Beanie changed the license plate on this red vehicle belonging to Mrs. Dye?" Detective Dillman responded under oath that "I have no knowledge of that, sir."

[52] At trial, Johnny Burnes obviously attempted to boost his credibility by stating that he and Wallace were "best friends" at the time of Kyles' arrest; this claim would have been supported by Wallace's repeated references to Burnes as his "partner."

The majority states that the state trial court found that Johnny Burnes was not a credible witness. The majority holds that this finding is entitled to deference under 28 U.S.C. § 2254(d). *See* Majority Opinion at 815-16. The majority errs here, at least if it is holding that we are bound by a state court fact-finding that Johnny Burnes was not credible as-a-matter-of-law at trial, which the majority appears to hold. The state trial court found that Burnes was not credible *at a post-conviction hearing* where Burnes testified, not in Burnes' testimony at trial. I further note that the majority's apparent reliance on § 2254(d) regarding Burnes' credibility *at trial* is inappropriate here because Johnny Burnes' credibility at trial could have been significantly boosted by this evidence that the State failed to disclose. The finding by the state trial court thus cannot bind us regarding Burnes' *trial* testimony. Even if the majority's

also provided other testimony important to the theory of the defense, namely that on Sunday, September 23, 1984, Burnes witnessed Wallace stooping down at the stove in Pinky Burnes' apartment where police ultimately recovered the murder weapon.

Second, Wallace's "tips" to police that they "would be smart" to look in the garbage outside Pinky Burnes' residence and that they could "set up" Kyles and find the murder weapon inside the apartment suggest that Wallace was in control of critical evidence. A jury could rationally infer based on Wallace's apparent control over the evidence that he was somehow involved in the murder.[53]

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characterization of the state court's finding was correct – which it is not – a state habeas court's view of the weight of evidence or testimony actually offered at a jury trial could be "found" by a state trial judge to be, in effect, incredible as-a-matter-of-law. Such a credibility finding – a *factual* finding – wrongly enters into the province of the jury; that is, the credibility of a witness's trial testimony would be a quintessential question for a jury, not a trial judge.

[53] In claiming that the undisclosed tape recording and various internal police memoranda regarding the garbage were not "material" under *Bagley*, the majority argues that even without the undisclosed evidence regarding the garbage tip, "Kyles made a credible case that Beanie could have planted this evidence. It was undisputed at trial that *anyone* could have had access to the garbage bags sitting on the curb and that Beanie was attempting to incriminate Kyles." Majority Opinion at 815. The majority makes the erroneous assumption that Wallace's mere opportunity to plant the incriminating items and concrete evidence that Wallace actually suggested to police that they should look into the garbage would have been equivalent in jurors' eyes. I simply cannot believe that a jury would not have given tremendous weight to Wallace's tip to police as highly probative evidence that he framed Kyles.

Also significant in this regard are Wallace's various confusing claims about how Mrs. Dye's purse was retrieved at the scene of the murder. In particular, Wallace made the odd claim that Kyles retrieved Mrs. Dye's purse from bushes next to the Schwegmann Bros.' parking lot. This simply makes no sense. Eyewitnesses to the murder testified that Mrs. Dye's brown purse was placed in the trunk before she was confronted by her attacker. No one testified that the assailant took her purse and placed it in nearby bushes before driving her car away. Even assuming that the purse did not somehow make its way into Mrs. Dye's car, which her assailant immediately drove away, this hardly explains how the purse could have ended up in nearby bushes. Wallace's bizarre claims about retrieving the purse from the bushes suggest that he was lying in order to dispel suspicion from himself about having possession of the purse. A jury could reasonably infer that Wallace's unsolicited communication to the police, when combined with his statements about such key evidence, indicated that he indeed "framed" Curtis Lee Kyles.[54]

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[54] I note that Detective Dillman explicitly testified at the state habeas evidentiary hearing that he was *not* given the tip that evidence might be found in the garbage outside Pinky Burnes' apartment from Wallace. Similarly, one of Sergeant Eaton's underlings, Officer Pascal Saladino, who actually seized the garbage, testified at trial that the police did not act on a tip in seizing the garbage. The State argues in its appellate brief that "[i]t is not clear that Beanie made this suggestion, but assuming he did, so what? In the context of the facts of this case, it is a suggestion that would not be unexpected and a conclusion that the police would be expected to reach." I observe that, at the state court post-conviction evidentiary hearing, Kyles' chief

Wallace made another incriminating admission during the first recorded conversation: he evinced an apparent awareness of the specific part of the parking lot where Mrs. Dye was killed. Although a jury possibly could rationally conclude, as the State and the majority contend, that Wallace gleaned this particular information from the media, a jury also certainly could reasonably conclude otherwise. This is potentially critical information to the theory of the defense in view of the fact that Wallace consistently denied that Kyles, Kyles' brother-in-law, or any of Kyles' other compatriots told Wallace that Kyles had murdered Mrs. Dye.

Another bit of potentially valuable information that Wallace disclosed in the September 22 statement that bolsters the theory of the defense concerns his repeated statements that Kyles not only generally wore a "bush" hairstyle, but also wore one on the day that Wallace purchased the car. Although Wallace at one point claimed that he bought the car on *Friday*, in at least one statement he also claimed that he was in the presence of Kyles on *Thursday*, within three hours of the murder. When combined with the numerous eyewitness statements describing the murderer as wearing his hair in braids or plaited, a rational jury could find this statement significant.

Finally, Wallace's admission to Assistant DA Cliff Strider that Wallace was in fact present during the "Sunday dinner" at Pinky Burnes' apartment is evidence from

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trial prosecutor testified that he did not remember a single instance before Mrs. Dye's murder where New Orleans police had searched and seized garbage on the street in front of a residence.

which a jury could infer that Wallace had an opportunity to plant the various incriminating items. Furthermore, in this regard, Wallace's statement specifically comports with Johnny Burnes' trial testimony that he witnessed Wallace reaching down and placing something behind the stove that Sunday night.

c) The undisclosed eyewitness statements

As the district court correctly observed "the essence of the [S]tate's case . . . was founded on the positive identification by four eye-witnesses who saw Curtis Lee Kyles at varying stages of the incident calmly placing a gun to the head of an unarmed woman, and blowing her brains out (for absolutely no other reason than to rob her), and then driving away in her car." Despite specific requests from the defense during pre-trial discovery, the State did not disclose the contemporaneous witness statements taken by New Orleans police from three of those four witnesses who testified at trial.[55]

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[55] Those four witnesses were Robert Territo, Isaac Smallwood, Henry Williams, and Darlene Cahill. Contemporaneous statements were taken only from Territo, Smallwood, and Williams. Three other eyewitnesses – Lionel Plick, Edward Williams, and Willie Jones, none of whom ever positively identified Kyles – did not testify at trial. According to the testimony of Officer John Dillman, three of the eyew. nesses, Smallwood, Henry Williams, and Territo, were able to positively identify Kyles from a pre-trial photographic line-up conducted a few days after the murder. That line-up consisted of pictures – both a frontal view and profile – of six young black males from the waist up. Kyles was #6 in the spread. Wallace was not a part of the spread. I observe that, in pictures with equivalent hair

Kyles points to Isaac Smallwood's statement, in which Smallwood described what he saw as follows: "I

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styles, Wallace and Kyles' facial features resemble each other. *See also Kyles v. State*, 513 So.2d at 268 ("There was . . . testimony that Wallace's and [Kyles] resembled each other."). Indeed, as Kyles points out, one of the eyewitnesses who identified Kyles out of the pre-trial photo line-up, Isaac Smallwood, positively identified Wallace rather than Kyles when presented with a post-trial photo line-up in which Kyles and Wallace had identical hair styles.

I also observe that the police officer who conducted the photo line-up and who testified about it at trial, John Dillman, made numerous statements under oath in the state court proceedings that cast serious doubt on his credibility. *See supra.* Such statements included testimony about the contemporaneous witness statements given by the eyewitnesses who testified at trial. As discussed *supra*, those witness statements were not turned over to the defense at trial, despite a specific request, because the State claimed that they contained nothing exculpatory. Dillman nonetheless testified about them at trial, without producing copies of them.

Kyles' trial counsel, on cross-examination of Dillman, asked him "[d]id these physical descriptions differ in any single point?" Dillman responded that "[p]ossibly the only discrepancy would have been in height. . . . *The discrepancy would have been anywhere from a description of five feet eight to a description of possibly six feet tall, which is a difference of three or four inches.*" (emphasis added). This response, of course, was simply untrue. Henry Williams' witness statement estimated that the killer was as short as 5'4", which would make the discrepancy *eight* inches. Similarly, when asked about age discrepancies, Dillman stated that the eyewitnesses all described the killer as being in his twenties when in fact three different eyewitnesses described the killer as ranging from seventeen to nineteen years old. As noted, Kyles was twenty-five at the time of the crime, and the photographs of Kyles in the record depict a man in his mid-twenties. Dillman also claimed that there was "no discrepancy in facial hair or features at all," When in fact Isaac Smallwood described

was standing near the old gas pumps, with my back facing the Chef Hwy, and facing old Gentilly Rd. *I heard a loud pop. When I looked around I saw a lady laying on the ground, and there was a red car coming toward me."* (emphasis added). According to this statement, Smallwood's identification of the assailant came when he drove the car, which Smallwood described as a "red thunder bird," past him. When a police investigator specifically asked him, "[w]hen you first heard the shot, and looked at the lady on the ground, was the black male standing near her?," Smallwood responded *"[n]o. He was already in the car and coming toward me."* (emphasis added).

Both at the pretrial suppression hearing and at trial, however, Smallwood gave a significantly different eyewitness account. He testified that he actually saw the black assailant, whom he positively identified as Kyles, struggling with Mrs. Dye. He further testified that he specifically saw Kyles raise the pistol – which Smallwood described as a "small black . . . .32" – and shoot Mrs. Dye in the head.[56] Smallwood also described Mrs. Dye's car as

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the killer as having a moustache, a feature described by none of the other eyewitnesses, many of whom claimed to have seen the killer up-close. (In photos of Kyles both before and after the killing, he possesses a light moustache.) Finally, Dillman neglected to mention that Smallwood described the killer as having shoulder-length braided hair, while Henry Williams described the killer as having "short" hair.

[56] When asked to describe what he witnessed, Smallwood informed jurors that "[w]ell, me and my partner was standing by the gas pump in Schweggman's parking lot. My partner seen this guy wrestling with this lady. We thought they was just playing with one another, thought they knew one another. So

a red "LTD." Thus, by the time of trial, Smallwood had not only changed his story by claiming that he actually witnessed the struggle and shooting, but also described it in vivid detail. He described the murder weapon as a small black .32 caliber pistol – which, of course, was the type of murder weapon used – and changed his description of the victim's car from a "thunderbird" to an "LTD."[57] Jurors were also not told that, shortly after the crime, Smallwood described the assailant as having shoulder-length hair and a moustache – descriptions given by none of the other eyewitnesses.

A second of the four eyewitnesses who testified at trial, Henry Williams, told police shortly after the murder that the assailant was "a black male, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 lbs., medium build, dark complexion, his hair looked like it was platted, it was short." I observe that the record makes numerous references to Curtis Kyles as being approximately six feet tall and slender; photographs in the record confirm these descriptions. Conversely, Joseph "Beanie" Wallace was described as being shorter than Kyles, perhaps by as much as a half a foot. Photographs of Wallace also depict a man possessing a medium build.

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the guy, he snatched her hand. When he snatched her hand, she wouldn't release the keys from her hand, so he just went up on his pocket and shot her in the head . . . [with] like a small .32, a small black gun that he took out of his right pocket." *When specifically asked by prosecutor Strider, "[a]nd did you see him actually shoot her," Smallwood stated "Yeah."*

[57] Smallwood's correction of such minutiae between the time of making the contemporaneous witness statement and the time of trial raises serious questions in my mind. In particular, the embellishment suggests that Smallwood was coached.

Both of these witness statements, neither of which were disclosed despite a specific pre-trial request by the defense, would have been valuable to the defense at trial. A reasonable juror could not have reached any other conclusion except that Smallwood dramatically changed his story by the time of trial, thereby undermining the credibility of his identification.[58] Williams, too, would have had a difficult time explaining how he could have described a 6' skinny man as being 5'4" or 5'5" and possessing a "medium" build.

The district court and the majority make much ado about the fact that all four eyewitnesses who testified at the second trial positively identified Kyles as the killer after the State brought in Wallace and had him and Kyles stand side by side for comparison. I do not believe that fact to be nearly as significant as the majority does. First, the same witnesses had, on numerous occasions,[59] previously identified Kyles in court as the killer, in identifications in which Kyles sat at the defense table and was not compared to Wallace. Three of the four had also seen

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[58] The majority concludes that because "Smallwood consistently stated that the gunman . . . drove [Mrs. Dye's car] close by him [Smallwood]." Smallwood's identification of Kyles at trial was reliable. *See* Majority Opinion at 812-13. The majority here ignores the important fact that a jury would probably have disbelieved *anything* that Smallwood said after it was revealed that he had fundamentally changed his account of the murder by the time of trial.

[59] At both trials, the witnesses identified Kyles both in pretrial suppression hearings and during the prosecution's case-in-chief. The comparative identifications, in which Wallace was made to stand beside Kyles, occurred at the second trial during the prosecution's rebuttal.

Kyles – but not Wallace – in photo spreads. Human nature as it is, the four had a psychological incentive, subconscious or otherwise, not to recant their positive identifications of Kyles.

Second, I believe that the in-court identifications by Williams and particularly Smallwood are of little probative value. While it is true that in-court identifications are generally considered significant prosecutorial evidence, *see generally Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), such evidence loses a great deal of its probative force when the defense establishes that a witness gave a significantly different account at the time of the original identification, *cf. Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) (noting that a key factor in deciding whether impermissibly suggestive line-up procedure followed by in-court identification caused harm to defendant is "the accuracy of the witness' prior description of the criminal"). Moreover, as the Supreme Court has observed, the effective impeachment of one eyewitness may have consequences that extend to another, unshaken eyewitness. *See United States v. Agurs*, 427 U.S. 97, 112-13 n. 21, 96 S.Ct. 2392, 2402 n. 21, 49 L.Ed.2d 342 (1976) (citing Comment, *Brady v. Maryland and The Prosecutor's Duty to Disclose*, 40 U.CHI. L.REV. 112, 125 (1972)). In Kyles' case, the remaining unimpeached eyewitness testimony would thus have been considerably less forceful had the two witness statements been disclosed.

Finally, it should also be generally noted that eyewitness testimony, contrary to popular belief, has repeatedly been proven notoriously unreliable. *See United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d

1149 (1967); Loftus & Ketcham, *Witness for the Defense: The Accused, the Eyewitness, and the Expert Who Puts Memory on Trial* (1991); Sanders, *Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards*, 12 AMER. J.CRIML. 189 (1984). As the United States Supreme Court observed in *Wade*, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." 388 U.S. at 228, 87 S.Ct. at 1933.[60]

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[60] In a Rule 60(b) motion filed in the district court following the denial of the habeas writ, Kyles for the first time offered an affidavit from one of the eyewitnesses who testified at trial – Darlene Cahill (now Darlene Kersh) – in which she swears under oath that she perjured herself at Kyles' two trials. The affidavit claims that she never in fact saw the murderer's face and that her trial testimony, in which she unequivocally identified Kyles as the killer, was entirely false. She further claims that she informed the prosecution of her inability to identify Kyles, but that prosecutors asked her to commit perjury. The district court held that the claim based on Cahill's testimony was an abuse of the writ. The court further held that, even if it were not abused, "such evidence would not have affected the jury verdict in this case. [Kersh's] testimony was cumulative and in the context of the entire trial transcript, rather inconsequential. . . . Ms. Kersh's testimony was of little consequence in relation to the other eye-witnesses and the evidence found in Kyles' girlfriend's apartment."

In a prior appeal in this case, this court held that Kyles' claim was not appropriately raised for the first time in a Rule 60(b) motion and that further claim had never been exhausted in the state courts. *See Kyles v. Whitley*, 980 F.2d 1445 (5th Cir.1992). We held that "a habeas petitioner may not use Rule 60(b) to raise constitutional claims that were not included in his original habeas petition." We further held that "[t]he district court should not, however, have said anymore" in its order denying relief.

d) The remaining *Brady* evidence

1) The computer print-out of license plate numbers

Another item of *Brady* evidence that was wrongly withheld, according to Kyles was a New Orleans Police Department computer print-out and attached cover memorandum dated "9-20-84" from Detective Patrick Jones to Detective John Dillman. The memo states, "[a]ttached you will find a print out of vehicles which were parked in the parking lots around Schweggmans [sic] on 9-20-84 at 9:15 p.m." Kyles argues that this print-out, which was not

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I believe that this claim should be returned to state court so that all of Kyles' specific claims may be reevaluated in view of this extremely serious allegation of prosecutorial misconduct and perjury – which, if proven true, would further demonstrate the pervasiveness of official misconduct in this case. I note that this new claim should not be held to be an abuse of the writ, assuming that his case makes its way back to federal court. As a general rule, I would of course agree that any constitutional claims raised for the first time after the district court denies an original habeas petition are abused. *See McClesky v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). However, because Kyles' new claim adds further fuel to the fire in terms of my concerns about whether Kyles was wrongly convicted, I would hold that the claim is not abused under the exception that permits claims to be raised for the first time in a successive habeas petition if a petitioner makes a "colorable showing of factual innocence." *See id.* at ___, 111 S.Ct. at 1471.

I further observe that the "materiality" standard regarding intentionally perjured testimony is "considerably less onerous" than the *Brady* "materiality" standard set forth in *United States v. Bagley*. *See Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir.1993). In cases where the prosecution intentionally procured or countenanced perjured testimony, a court must order a new trial if there was "any reasonable likelihood that the false testimony could have affected the jury's verdict." *Id.*

disclosed to defense counsel at trial, would have been valuable exculpatory evidence because it tends to prove that Kyles' car was not in the parking lot on the night of the murder.

At trial, the State introduced a photograph made by police at the crime scene immediately following the murder. The blurry, blown-up photograph, according to the State, depicts a portion of the top of Curtis Kyles' car, which allegedly was still parked in the Schwegmann Bros. parking lot within an hour or two after the murder. As I discuss *infra*, the State's photographic evidence here is anything but conclusive. Had Beanie Wallace taken the stand at trial and repeated his claim made twice to police that he, Kyles, and Kyles' brother-in-law drove to the Schwegmann Bros. parking lot on the evening of Friday, September 21, 1984, to retrieve Kyles' car, the computer print-out would have been valuable impeachment material, thus supporting the theory of the defense.[61]

The district court stated that the print-out "fails to fit the *Brady* mold" because at the state post-conviction evidentiary hearing "the defense learned that the list was not a complete list of the cars in the lot at the time; therefore, it is evidence that would carry little if any exculpatory weight. . . . " The testimony to which the district court referred was given by Detective John Miller, who testified that the print-out was incomplete and likely

[61] Even if Beanie Wallace had claimed that the car was retrieved on Thursday early in the evening – before the license numbers were recorded by police – Wallace's two inconsistent statements given to police would have been available to impeach Wallace's credibility on this point.

did not include the parking lot that was supposedly depicted in the blown-up police photograph offered into evidence at trial.

I believe that the district court erred by accepting Miller's testimony as conclusive. Assuming the print-out was available to the defense at the time of trial, defense counsel would have been free to argue that the list was a complete one. Indeed, I observe that the list contains seventeen different license numbers, and the memorandum attached to it states "attached you will find a print out of vehicles which were parked in *the parking lots around Schweggmans [sic] on 9-20-84 at 9:15 p.m.*" (emphasis added). The memorandum does not state that it is a "partial" list or that it was a list of vehicles in a portion of the Schwegmann Bros. parking lot. This memorandum, by not qualifying the scope of the police's search of automobiles in the Schwegmann Bros. parking lots in any manner, belies Detective Miller's claim. Finally, Miller's name does not appear among the five police officers' names listed on the memorandum. The issue of whether the list was or was not complete would have been a quintessential jury question.

2) The police garbage memorandum

As discussed, *supra*, with respect to Beanie Wallace's September 21, 1984 suggestion to police regarding the garbage, the State also failed to disclose police memoranda relating to the search and seizure of the garbage in front of Pinky Burnes' apartment on September 24, 1984. In particular, Kyles points to a memorandum dated "9-23-84" from Sergeant James Eaton to Sergeant Dave

Morales that states "[w]e have reason to believe" Mrs. Dye's personal effects and Schwegmann's bags would be in the garbage scheduled to be picked up by sanitation workers on Monday morning. Like Wallace's recorded statement to police in which he makes the garbage tip, this memorandum would have been valuable evidence that would have bolstered the theory of the defense that Wallace "framed" Curtis Lee Kyles.

e) The remainder of the State's case

Once the effect of all of the *Brady* evidence is considered, what is left of the State's case is tenuous at best. The majority points to the fact that the murder weapon, a homemade holster, bullets, and pet food supposedly purchased by Mrs. Dye at Schwegmann Bros. Were found in Pinky Burnes' apartment as strong circumstantial evidence of Kyles' guilt. I disagree. Kyles took the stand and claimed that the weapon and holster did not belong to him and must have been planted. While ordinarily such a self-serving claim indeed would have little weight, the majority ignores the strong circumstantial evidence that Beanie Wallace in fact planted evidence – namely, his tips to police that they "would be smart" to look in the garbage and the could "set up" Kyles and find the murder weapon. The majority also ignores the evidence that Wallace had a ready opportunity to plant the evidence during the "Sunday dinner" at Pinky Burnes' residence.

With respect to the pet food found in Pinky Burnes' apartment, Kyles testified that he had purchased the cans at the Schwegmann Bros. – which was located "very

near" Pinky Burnes' apartment, according to trial testimony – during the previous week or so. While Kyles claimed that he remembered the items being "on sale," the State introduced evidence that the particular brands of pet food were not sale-priced but instead were regularly priced. The majority contends that this testimony undermines Kyles' explanation for the presence of the pet food. However, a closer reading of Kyles' testimony undercuts this supposedly damning bit of impeachment evidence about what was actually a collateral matter.[62]

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[62] The alleged existence of a sale price was gratuitously offered by Kyles during his testimony. It was not as if the pet food allegedly purchased by Kyles and that supposedly purchased by Mrs. Dye were distinguishable by the fact that one was on sale and other was not. Indeed, the State's own evidence established the contrary. Furthermore, I believe that the State and the majority put entirely too much stock in the import of Kyles' testimony. The following colloquy occurred between the prosecutor and Kyles:

Q. [prosecutor:] How do you know it was on sale?

A. [Kyles:] Because they had a little sign that said three for such and such, two for such and such at a cheaper price. It wasn't even over a dollar.

Q. There was a sign where?

A. In the Schwegmann's Supermarket. . . . It wasn't big. It was a little bitty piece of slip like they had on the shelf. As I was looking at the cat food, I was looking at these many for so much. [sic].

Q. They had two different signs [for the two brands purchased]?

A. They have a sign by every item in there.

Kyles, whose intelligence is limited, *see Kyles v. State*, 513 So.2d at 274 (noting Kyles' IQ is 83), appears to me to have been inartfully explaining that he believed that the cans of pet food were "on sale" simply because they were marked two or there for a particular price. His reference to a sale "sign" actually

Furthermore, I read Kyles testimony to actually bolster his credibility in one significant respect. *Before being shown the cans by the prosecutor – cans that were seized and in the possession of the State at trial* – Kyles stated that the pet food cans were priced "two" or "three for such and such. . . . It wasn't even over a dollar." During cross-examination, the cans were *first introduced by the prosecutor* after Kyles had testified about them being "on sale." The prices were revealed as in fact being "two for 77 cents" and "three for 89 cents." The actual prices of the cans fully and precisely comport with Kyles' description. I simply do not believe that this is mere coincidence. Also with respect to Kyles' claim that he purchased the pet food for his children's own pets, the state habeas courts and the federal district court ignored the important fact that one of the State's own photographs offered into evidence at trial depicts the inside of closet in the apartment in which a half-empty bottle of pet shampoo is clearly visible.

The State also has argued that the Schwegmann's sales receipt bearing Kyles' fingerprints that was found in Mrs. Dye's car is strong circumstantial evidence against Kyles. Kyles testified that he indeed did ride in the car, which Wallace at that point possessed, on Friday, September 21, 1984 – one day after the murder. Kyles stated that Wallace came by Pinky Burnes' residence and the two drove to Schwegmann Bros., where Kyles purchased a

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appears to be referring to stock labels that are commonly used in grocery stores and regularly appear on the shelf (as he stated, "a little bitty piece of slip like they had on the shelf. . . . They have a sign by every item in there.").

can of transmission fluid and a package of cigarettes.[63] At trial, Kyles theorized that the receipt must have fallen out of the bag into the car when he removed the items. As noted in *supra* Part I., *the receipt was the only physical evidence offered by the State that bore Kyles' fingerprints. Not the murder weapon. Not the purse or any other of Mrs. Dye's belongings. And not Mrs. Dye's car.*

Under scrutiny, the sales receipt, like the rest of the State's evidence, not only fails to incriminate Kyles but actually supports the theory of the defense. To begin with, the receipt was only approximately two inches long. Yet Mr. Dye testified that he believed that he wife was shopping for *an entire week's groceries* not only for Mr. and Mrs. Dye, but also for houseguests. Mr. Dye testified that his wife usually brought home six or eight bags of groceries whenever she went shopping at Schwegmann Bros.[64] The State never explained the obvious variance between the length of the receipt with Kyles' fingerprints on it and the length of the receipt that would have resulted from a week's grocery-shopping.

Also notable is the fact that a State's witness who testified about the receipt stated that the receipt was

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[63] As discussed in *supra* Part I., Wallace's various statements indicate he was in fact in possession of the car, as Kyles claimed, at least by Friday. To corroborate his claim that he bought transmission fluid for his car, Kyles also offered into evidence a color photograph of his car apparently leaking some type of oily fluid.

[64] Perhaps the only consistent point in all of Wallace's statements to police was that there were numerous bags of Schwegmann Bros. groceries in Mrs. Dye's car.

recovered from "the right front floorboard," i.e., the passenger's compartment. Kyles testified that Wallace drove him to Schwegmann Bros. and, thus, his claim is consistent not only with the length of the receipt but also the placement of it in the passenger's compartment. Because the police destroyed writing on the receipt in removing Kyles' fingerprints from it, there is no way to know with certainty whether the receipt in fact memorialized a purchase on the day of the murder or on the next day, as Kyles claimed. However, the circumstantial evidence supports Kyles' version of events.

The last significant piece of evidence offered by the State at trial was a blurry, blown-up photograph of what the State claimed is Kyles' rust-colored Mercury parked in the Schwegmann Bros. parking lot shortly after the murder. The blow-up is actually part of a crime-scene photograph taken immediately after the murder. Apparently, the police discovered what they believed was Kyles' car well after the time of the crime. The photograph shows only a small fraction of the right side of a tan, orange, or perhaps rust colored American-made car, which appears to be a two-door model and which has a vinyl top. It is impossible to discern the make or model of the car. The State also offered two pictures of Kyles' rust-colored Mercury, which also has a vinyl top, although the pictures only depict the car from the front and back; the photograph of the back of Kyles' car is of limited value since the trunk is open, which blocks the vast majority of the backside. There is no way to identify whether the vehicle in the crime-scene photograph is Kyles' car. Thus,

the State's photographic evidence here is of extremely limited – if any – probative value.[65]

Finally, it seems that at least some weight should be given to the many witnesses who testified in Kyles' defense. Numerous witnesses testified that Beanie Wallace was not only in possession of a bright red automobile resembling Mr. Dye's car immediately after the time of the murder, but also that Wallace was anxious to sell the car. Those witnesses also testified that Wallace's hair was braided. Although those witnesses were either friends or family of Kyles, at least two of them – Ronald Gorman and Johnny Burnes – were also friends of Wallace.[66] Another of those witnesses, Kevin Black, was employed as a security guard for the municipal airport in New Orleans – a position of some trust, which reflects positively on his credibility. Two defense witnesses also testified that Beanie Wallace had romantic aspirations for

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[65] I am curious as to why the State did not offer a photograph of Kyles' car from the same angle as the car depicted in the crime-scene photograph – which would have greatly facilitated a comparison. The crime-scene photo reveals the angle of the vinyl top on the car and also shows a large metal strip of molding that runs along the edge of the vinyl top. The State's photographs of Kyles' car reveal neither the angle of his vinyl top nor whether there is metal molding comparable to that on the car in the crime-scene photograph. The small portion of the vinyl top of Kyles' car appears *not* to have metal molding running along the edge, although I cannot be certain from the State's photographs.

[66] In Wallace's first recorded statement he repeatedly refers to Johnny Burnes as his "partner" and housemate. In a subsequent statement, Wallace stated that he drove around the French Quarter with Gorman on the night after the murder.

Pinky Burnes, thus providing an additional motive for Wallace to frame Kyles.[67]

III.

In conclusion, after a painstaking review of the entire record, I am convinced that Curtis Lee Kyles should receive a new trial. As a result of both a series of *Brady* violations and a related ineffective-assistance-of-counsel violation, Kyles' jury was not permitted to consider much of the relevant evidence. Because my confidence in both the jury's guilty verdict and death sentence are undermined, I would grant the writ of habeas corpus.

Judge Learned Hand once wrote that "[o]ur procedure has always been haunted by the ghost of an innocent man convicted. It is an unreal dream." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y.1923). I fear that in this instance it is not simply a dream. I therefore dissent.

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[67] As discussed in connection with Wallace's first recorded statement, it was also obvious that Wallace hoped to receive remuneration for assisting the police. As he told police during the September 22 conversation, "I ain't doin' this for nothing, you know." An additional motive is evident from statements that Wallace made during the first recorded conversation with New Orleans police. Among other things, Wallace stated:

i) "I betcha . . . I can get in a lot of trouble with the shit?" – making reference to the fact that he was in possession of Mrs. Dye's car;

ii) "Am I going to jail?"; and

iii) Wallace stated that he feared that "I would be charged" with Mrs. Dye's murder because "a [black] male . . . in his twenties" committed the murder.

APPENDIX A

Curtis Lee KYLES

v.

John WHITLEY, Warden Louisiana State Penitentiary, Angola, Louisiana.

Civ. A. No. 90-4031.

United States District Court, E.D. Louisiana.

March 24, 1992.

ARCENEAUX, District Judge.

ORDER AND REASONS –

Petitioner Curtis Lee Kyles seeks a writ of habeas corpus testing his conviction of capital murder and his sentence of death. His execution was stayed by order of this court on November 2, 1990.

Procedural Background

On December 7, 1984, Curtis Lee Kyles ("Kyles") was convicted of first degree murder under La.Rev.Stat. 14:30 and was sentenced to death. His conviction and death sentence were affirmed by the Louisiana Supreme Court in State v. Curtis Lee Kyles, No. 86-KA-0800,[1] which was rendered on September 9, 1987; rehearing was denied on October 17, 1987. Petitioner then applied to the Supreme Court of the United States for a Writ of Certiorari which

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[1] 513 So.2d 265 (La.1987), *cert. denied*, 486 U.S. 1027 [108 S.Ct. 2005, 100 L.Ed.2d 236], *reh'g denied*, 487 U.S. 1246 [109 S.Ct. 4, 101 L.Ed.2d 955] (1988).

was denied without evidentiary hearing on May 23, 1988; rehearing was denied on August 17, 1988.

On January 2, 1989, Kyles petitioned the Criminal District Court for the Parish of Orleans, State of Louisiana, for a Stay of Execution, Post-Conviction Relief, Writ of Habeas Corpus, Evidentiary Hearing, and Motion for New Trial on the basis of newly discovered evidence. Kyles alleged in this petition that his constitutional rights had been violated in twenty ways. Kyles was not granted an evidentiary hearing, and his application was denied on January 6, 1989. This decision was appealed to the Louisiana Supreme Court by Application for Supervisory Writ. The Louisiana Supreme Court granted the application for the writ and ordered an evidentiary hearing in the criminal district court.

An evidentiary hearing was conducted intermittently from February 20, 1989, to June 1, 1989. Judge Dennis Waldron of the Criminal District Court for the Parish of Orleans denied petitioner's motions and rendered a judgment.[2]

On April 2, 1990, petitioner filed an Amended and Supplementary Application for Supervisory Writs to Review Final Judgment of the Criminal District Court for the Parish of Orleans, Section "F", denying State Order and Post Conviction Relief. On September 14, 1990, the Louisiana Supreme Court in a 5 to 2 opinion, denied the application without reasons.

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[2] Judge Waldron has presided over all of the proceedings in this matter in criminal district court.

On September 28, 1990, the Louisiana Supreme Court denied a motion for a stay order and suggested that Kyles apply to the federal court system.

On October 2, 1990, Judge Waldron issued a Warrant of Execution ordering Kyles to be executed on November 8, 1990. Kyles then petitioned the United States Supreme Court to stay the execution. The Supreme Court denied that motion on October 26, 1990.

Kyles then filed the instant petition requesting a stay of execution under 28 U.S.C. § 2254. After having filed the petition, Kyles supplemented it by adding a claim that the electric chair, then in use in Louisiana, violated his constitutional rights. This claim had not been exhausted in the state court system; therefore, this court allowed Kyles to withdraw the supplemental petition to pursue those claims in the Louisiana court system.

The criminal district trial court denied defendant's electrocution-based writ application. Kyles then applied for writs to the Louisiana Supreme Court which were denied on May 24, 1991. On June 5, 1991, the court received notification of the Louisiana Supreme Court's decision and a request that it take up this issue as well as those held in abeyance at that time. Kyles objected to this course of action because he intended to raise the electrocution issue by writ to the United States Supreme Court.

On June 25, 1991, Louisiana changed its method of execution from electrocution to lethal injection. The law became effective on September 25, 1991, thereby mooting this issue.

This court ordered additional briefing concerning any developments in the law since the time that the petition was originally filed which briefing was received in early September of 1991.

The Court has reviewed in detail, inter alia, the transcripts of the hearing held on Kyles' motion to suppress identification and on his motion to suppress evidence; the trial transcript and evidence adduced in that proceeding; and the post-trial proceedings transcripts and the evidence adduced there; the copious pleadings, briefings, exhibits, and statements filed in conjunction thereto, and the applicable law. The Court firmly believes that Kyles was given a fundamentally fair trial with able assistance by counsel. For the reasons that follow, the Court rejects Kyles' petition for habeas corpus relief.

Facts of the Case

At approximately 2:20 p.m. on September 20, 1984, Mrs. Dolores Dye, a 58-year old white female was murdered in the parking lot at Schwegmann's Giant Supermarket at 5300 Old Gentilly Road, New Orleans, Louisiana.[3] Four people who witnessed the incident testified at the trial.

The testimony established that a black man accosted the victim as she placed her groceries in the trunk of a

[3] The facts of this case are set out in great detail in *State v. Kyles*, 513 So.2d 265 (La.1987). It should also be noted at the outset that the first trial of Kyles for this murder ended in a mistrial after four hours of deliberation by a jury. This conviction arises from a second trial.

red Ford LTD. One witness testified that the victim threw her purse into the trunk, slammed the lid, and tried to get away. The assailant chased her and wrestled her to the ground. When she attempted to escape again, the robber grabbed her arm, drew a revolver from his waistband, and fired it into her left temple, killing her instantly. The gunman then took her keys from her hand, got into her car, and drove slowly from the parking lot.

The police were aided in their investigation when on Saturday night at about 10:00 p.m. Joseph "Beanie" Wallace informed police investigators he had purchased a red Ford LTD the previous day from defendant.[4] The police determined that the car was registered in the victim's name.

After having ascertained Kyles' name and address from Beanie, who specifically pointed out Kyles' apartment to the authorities, the police picked up five identical sacks of garbage outside of his home at approximately 1:00 a.m. on September 24, 1984. Inside one of these garbage bags, the victim's purse and personal belongings were found. At 6:07 p.m. on September 23, 1984, a search warrant for Kyles' house was issued.

[4] At the post-conviction hearing. Detective John Miller testified that he had spoken to Beanie on no more than half a dozen occasions concerning various, unrelated shootings. This instance was the first that Detective Miller could use Beanie's information because it was a homicide. (Transcript of Post-Conviction Relief Hearing, Detective Miller, February 24, 1989, at 3.) The court notes this fact because of petitioner's allegations that Beanie was an unreliable source.

At approximately, 10:00 a.m. on the 24th of September, 1984, Kyles was arrested outside his home. Police recovered a .32 revolver, which was later determined to be the murder weapon, from behind the stove in his kitchen, as well as a hand-made holster, which fit the murder weapon and which was found in a chifferobe in the hall, various boxes of ammunition containing bullets which could be used in the murder weapon, and a rifle. In a kitchen cabinet, the police found groceries in Schwegmann's bags, including brands of dog and cat food normally purchased by the victim.

Partial fingerprints were found on the victim's effects, but none was sufficient for a positive identification. No fingerprints were found on the .32 revolver or in the LTD, although defendant's prints were recovered from a Schwegmann's cash register receipt found on the floor of the car. However, the chemical process used to raise the fingerprints on the register receipt destroyed the inked printing on the paper, thus making it impossible to determine what the receipt was for or when the purchase was made.

Three of the eye-witnesses to the murder picked defendant out of photographic lineups conducted on September 24, 1984. These witnesses, as well as a fourth who had not been asked to make a photographic identification, also positively identified defendant at trial as the murderer.

The defense contended at trial that the informant, "Beanie" had actually committed the murder and had framed Kyles. The defense presented several witnesses who saw Beanie in a red car similar to the victim's about

an hour after the killing.[5] Other witnesses testified that Beanie had attempted to sell the car shortly after the murder.

The linchpin of the defense, however, was the defense's theory that Beanie had planted all of the incriminating evidence on Kyles. Evidently, a Sunday dinner was served at Kyles' "home"[6] on September 23, 1984. Testimony conflicted greatly as to the number of adults present at the meal and what was served. The defense maintains that it was then that Beanie framed Kyles.

To that end, Johnny Burnes, Kyles' common-law-brother-in-law, testified that he saw Beanie stoop down behind the stove where the gun was found. (Trial Transcript, Burnes' Testimony, pp. 259-89, at 263.) Kyles testified that the holster was not his and must have been planted in the chifferobe. The same explanation was given with respect to all of the ammunition. Kyles further testified that the rifle found belonged to Beanie. He explained that because Kyles had lent Beanie $20.00, Beanie had given him the rifle as collateral. (Trial Transcript, Kyles' Testimony, pp. 318-374, at 319). The motive for this "frame job" was Beanie's alleged romantic interest in Martina "Pinky" Burnes, Kyles' common-law wife

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[5] All of these witnesses were either close friends of the defendant or related to the defendant's girlfriend and mother of his children, "Pinky" Burnes.

[6] The court uses the term "home" loosely. The apartment in question was the apartment of Kyles' girlfriend where she resided along with her four children by Kyles and where he evidently stayed with some frequency.

and mother at that time of four of his children, as previously noted.

Kyles denied any involvement in the shooting, explaining his fingerprints on the cash register receipt by asserting that Wallace had picked him up in a red car the day after the murder and had taken him to Schwegmann's where he purchased transmission fluid for his car and a pack of cigarettes. He suggested that the receipt might have fallen from the bag when he removed the cigarettes. As to an explanation concerning the presence of dog and cat food, there was varying and conflicting testimony from all of the defense witnesses as to whether or not Kyles or his children had a dog or cat.

On rebuttal, Beanie was brought into the courtroom. Each of the four eye-witnesses attested that Kyles, not Beanie, was the person that each saw commit the crime. The jury and the court were given the opportunity to see any possible resemblance between the two.

After being charged and deliberating, the jury unanimously found defendant guilty of first degree murder.

In the sentencing phase, the prosecutors relied on the evidence adduced during the guilt phase of the trial. The defense called two of the defendant's sisters and two of his brothers who testified that defendant had a close relationship with his children and loved and supported them. Defendant also took the stand and continued to assert his innocence.

The jury unanimously recommended the death penalty, finding as the sole statutory aggravating circumstance that the killing occurred during the commission of an armed robbery.

At the post-conviction hearing ordered by the Louisiana Supreme Court, the trial court received testimony concerning twenty issues, among other things, alleged Brady materials which had not been turned over to defendant, ineffectiveness of counsel, and approximately 18 other violations. After the hearing which was conducted on intermittent days, Judge Waldron issued a judgment denying Kyles' motion for a new trial and the relief sought in his Writ of Habeas Corpus.

As previously stated, petitioner then filed an Amended and Supplementary Application for Supervisory Writs to Review Final Judgment of the Criminal District Court for the Parish of Orleans on April 2, 1990. After the Supreme Court of Louisiana denied writs without written reasons, the same issues were raised by counsel for Kyles in the instant § 2254 petition which the Court will now address.

Issues Presented

I. Denial of Motion for Stay of Execution, Evidentiary Hearing and Motion for a New Trial

Kyles claims a violation of his due process rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because Judge Waldron denied his Motion for Stay of Execution, Evidentiary Hearing and Motion for New Trial without a hearing on

January 6, 1989. Petitioner states,"Based upon the true allegations set forth in the Application for Supervisory and Remedial Writs, Curtis Kyles should have prevailed."

First, it appears from the recitation of the procedural history of this case as supplied by Kyles that the Supreme Court ordered an evidentiary hearing in Criminal District Court on the motion for new trial and the writ of habeas corpus contained in defendant's January 2, 1989, pleadings, which hearings were conducted over a period of months from February 20, 1989 to June 1, 1989, and which served as the basis for Judge Waldron's judgment dated November 9, 1989. Thus, it seems illogical to argue that Kyles' rights were violated when the Supreme Court of Louisiana, acting upon Kyles' applications for relief, ordered a hearing for that precise purpose and the criminal district court obeyed that order.

Furthermore, as previously noted, filed in conjunction with the motion for new trial and motion for an evidentiary hearing, was Kyles' application for a writ of habeas corpus. As such, the state court proceedings of which Kyles complains were collateral in nature and not direct challenges to the validity of his conviction. The state court's alleged error in the conduct of its habeas proceedings presents no constitutional violation. *See Byrne v. Butler*, 845 F.2d 501, 509-10 n. 8 (5th Cir.), *cert. denied*, 487 U.S. 1242, 108 S.Ct. 2918 [101 L.Ed.2d 949] (1988); *Millard v. Lynaugh*, 810 F.2d 1403, 1410 (5th Cir.), *cert. denied*, 484 U.S. 838, 108 S.Ct. 122 [98 L.Ed.2d 81] (1987). This claim is without merit.

II. Brady Violations

Kyles maintains that the state failed to meet its obligations to provide to defendant exculpatory materials under *Brady v. Maryland*, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963), and its progeny. The materials claimed to have been wrongfully withheld are:

> A. a recorded statement obtained when the officers, following up on Beanie's phone call concerning Mrs. Dye's vehicle, met Beanie;
>
> B. a computer print out which listed license plate numbers of the cars in Schwegmann's parking lot on the evening of the murder;
>
> C. an inter-office memorandum directing Kyles' garbage to be picked up with the implication that evidence was to be found therein.

The suppression by a prosecutor of evidence favorable to and requested by an accused violates due process when the evidence is material either to guilt or to punishment, irrespective of the prosecutor's good or bad faith under *Brady*. *Id.* However, the non-disclosed evidence must be material. The suppression of evidence violates due process "only if it deprives the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381 [87 L.Ed.2d 481] (1985). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*, 473 U.S. at 682, 105 S.Ct. at 3383.

Petitioner has urged this court to adopt a heightened standard in this instance in relation to the "harmful effect of withheld exculpatory evidence in capital sentencing." (Memorandum of Facts and Law filed in conjunction with Petition at 40). Kyles urges instead to use the "no effect" standard found in *Caldwell v. Mississippi*, 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231] (1985), or the "harmless beyond a reasonable doubt" standard referred to in *Satterwhite v. Texas*, 486 U.S. 249 [108 S.Ct. 1792, 100 L.Ed.2d 284] (1988). While this court declines petitioner's invitation to use these different standards in its analysis, it notes that even if it did, it would find that the evidence withheld did not have any adverse-due process effect, no matter which of the three standards were applied.

A. The Recorded Statement

The recorded statement at issue was made by the police simply as a precaution for the officer who was wearing the "wire." The police file was not turned over the district attorney until after the trial. Thus, the prosecution did not have the information to turn over in a timely fashion.

Kyles alleges that had he had the tape recording he would have learned that:

1) Beanie knew in what area of Schwegmann's parking lot the murder was committed;

2) Beanie had said that Kyles wore a "bush" hairstyle in contrast to testimony that the killer had "plaits";

3) Beanie asked for $400 for the purchase price of the victim's car and was assured by the police that he would be paid;

4) Beanie suggested to the police officers that Kyles might put incriminating evidence in his garbage; and

5) Beanie feared apprehension because he had been seen driving the Dye automobile.

First, the characterization of these "facts" being established by this tape as argued in Kyles' petition is not a fair rendition of the material contained in the tape itself. Secondly, the material does not exculpate Kyles. Finally, as to fitting "hand in glove" with the defense's position that Beanie framed Kyles, the fact is that after reviewing all of the testimony presented, the defense's theory has no viable or credible evidence to support it. In this court's judgment, the jury's verdict would not have been different had this information been available to the defense.

B. The Computer Print-Out

With respect to the computer print-out, at the evidentiary hearing, the defense learned that the list was not a complete list of the cars in the lot at that time; therefore, it is evidence which would carry little if any exculpatory weight and bears so little materiality that it fails to fit the *Brady* mold. (Post-Conviction Hearing, Detective John Miller, February 24, 1989, at 11).

C. The Inter-Office Memo

The court rejects the *Brady* argument with regard to the interoffice memo concerning the statement that "[w]e

have reason to believe the victim's personal papers and the Schwegmann's bags will be in the trash." First the only "garbage" statement contained in the transcript of the tape is Sergeant Eaton's recital that Beanie said, "his garbage goes out tomorrow said if he's smart he'll put it in garbage. He said but he ain't that smart." (sic)[7] Sergeant Eaton did order the garbage to be picked up, but the bags that were picked up were identical, which renders improbable, if not impossible, the defense's argument that Beanie planted a bag of garbage.

To that end, the defense asks this court to rely on the hearsay statement of Martina "Pinky" Burnes, who defense counsel Martin Regan said that he could not rely upon in preparing Kyles' defense. Pinky stated that Steve Turner, who lived with the Burneses (as did "Beanie"), told her that he saw Beanie take a garbage bag and fill it with garbage from the neighbors' trash on North Dorgenois Street in the evening hours of Sunday, September 23, 1984, "apparently to drop off the garbage bag in which he had placed Mrs. Dyes' purse in front of Curtis' residence." (Post-Conviction Hearing, Testimony of Martina Burnes, April 7, 1989, at 21-22). In order to give any credence to this story, Beanie would have to have known and used the same type garbage bags that Kyles used since they all resemble one another. This court finds Martina's testimony incredible considering that she had

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[7] Eaton also testified that the transcript of the tape was incorrect in that Eaton is the one who made the comment that "[Kyles] was not that smart," because Eaton "did not want Beanie to have any knowledge of what [Eaton] may do later." (Post-Conviction Hearing, Sergeant Eaton, March 3, 1989, at 65).

the opportunity to raise these points before Kyles' trial and did not.

A complete reading of the record convinces this court of Kyles' guilt and that he received a fair trial. The positive identification by four witnesses of Kyles as the perpetrator when each witness was given the opportunity to view Kyles and Beanie together, combined with the jury's opportunity to compare these two individuals to decide whether they had a reasonable doubt that Beanie could be mistaken for Kyles, combined with the varying and inconclusive testimony of Kyles' friends, leads this court to the ineluctable conclusion that the *Brady* materials were not material, that they would have made no difference in the outcome of this trial, and that there is no probability (much less a reasonable probability) that disclosure of any of the so-called "*Brady* materials" would have changed the result of the proceedings.

III. Ineffective Assistance of Counsel

Kyles has alleged nine errors of counsel prior to trial, nine errors of counsel during trial, and two errors after trial, which Kyles claims resulted in his having been denied effective assistance of counsel in contravention of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. Defendant asserts that had be received effective assistance of counsel "there is a reasonable probability, if not a certainty, that the outcome of both the guilt phase and the sentence phase of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984)."

Under Strickland, Kyles is required to satisfy a two part test to merit relief on claims of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient . . . that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth amendment. Second, the defendant must show that the deficient performance prejudiced his defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064. Only if petitioner proves both elements, is he entitled to relief.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2065. However, this means that the court must not employ hindsight in making its fair assessment of defendant's claims. The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* 466 U.S. 690, 104 S.Ct. at 2066; *Earvin v. Lynaugh*, 860 F.2d 623, 625 (5th Cir.1988), *cert. denied*, 489 U.S. 1091, 109 S.Ct. 1558 [103 L.Ed.2d 861] (1989).

Second, Kyles must demonstrate that there is a reasonable probability that but for counsel's conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. As stated by the *Strickland*, court:

> The governing legal standard plays a critical role in defining the question to be asked in

> assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that absent the errors, the sentencer – including an appellate court, to the extent it independently weighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. 466 U.S. at 697-98, 104 S.Ct. at 2068-69.

Finally, this circuit has held that if a state court record is clearly adequate to fairly dispose of the claims of inadequate representation, further inquiry is unnecessary. *De Luna v. Lynaugh*, 873 F.3d 757 (5th Cir. 1989), *cert. denied*, 493 U.S. 900, 110 S.Ct. 259 [107 L.Ed.2d 208] (1989). In this instance, the court finds that the state court record meets this standard, and thus, this court will not entertain another evidentiary hearing.[8]

Within this framework the following issues were raised by petitioner:

A. Ineffective Assistance Prior to Trial[9]

1. Kyles alleges that counsel was ineffective with respect to the motion to suppress evidence recovered

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[8] It is important to also note that a state court's findings of fact are entitled to a presumption of correctness under § 2254(d) unless one of the eight exceptions is present. 28 U.S.C. § 2254(d). The presumption of correctness extends to implicit fact findings. *Thompson v. Linn*, 583 F.2d 739, 741-42 (5th Cir.1978).

[9] Petitioner had Attorney Samuel Dalton testify at the post-conviction evidentiary hearing. Mr. Dalton was presented as an "expert" in defense of death penalty cases. As a hired expert, it is not surprising that he opined that with all of the "errors" committed by counsel Martin Regan, an entirely different trial would have ensued. However, this court cannot approach this question as though it has no experience in trial advocacy and the rigors of criminal cases.

In the instant matter, Mr. Regan was retained counsel for Kyles. Mr. Regan has appeared before this court under similar circumstances, albeit never in a capital case, on numerous occasions. The court notes for the record that Mr. Regan has consistently conducted himself as an extremely careful and zealous defense lawyer.

It is impossible for this court to place much credence in this "expert's" opinion.

from the garbage, because he did not call as a witness Detective Miller, another policeman involved in the investigation who, defendant maintains, would have testified that the garbage was picked up because of Beanie's tip.

This claim is without merit for various reasons. To begin with, defendant has no constitutional right of privacy in his garbage. *California v. Greenwood*, 486 U.S. 35 [39-43], 108 S.Ct. 1625, 1628-30 [100 L.Ed.2d 30] (1988); *United States v. Vahalik*, 606 F.2d 99, 100-01 (5th Cir.1979); *Louisiana v. Kyles*, 513 So.2d 265, 269 (La.1987). Therefore, it is irrelevant how the police decided to pick up those five bags. Next, this assertion is based on information obtained *after* trial which this court is not allowed to consider as discussed above. Thus, this assertion does not state a valid ineffective assistance claim.

2. Kyles asserts that it was ineffective assistance for Regan not to have moved for a continuance to ascertain from residents around 2313 Desire St. (Pinky's residence) how many bags of garbage they put out on the day in question and whether they saw anyone else place a garbage bag in front of the house. This argument, again, is based on defendant's post-trail hindsight which the court will not consider as providing evidence of allegedly deficient trail conduct. Furthermore, from the evidence, it is apparent that all of the bags were the same and were "lined up" when picked up indicating that they probably came from Kyles' apartment.

3. Petitioner argues that counsel erred in his failure to interview Steven Turner, who allegedly told Martina ("Pinky") Burnes that he saw Beanie fill a garbage bag

and leave his house on North Dorgenois. (See discussion, *supra*). Again this claim goes back to the alleged "tip" from Beanie about the garbage of which counsel had no knowledge when his alleged failure to interview Turner would have had any relevance. In addition, it would appear that counsel was unaware of Turner's alleged discussion with Pinky. As such, the allegation is based on hindsight which the court will not consider. Furthermore, the picture in evidence of the five garbage bags belies this story in its entirety.

4. Regan was also allegedly ineffective because he failed to investigate and interview Marrian Burnes who allegedly saw the murder weapon in Beanie's possession one or two weeks prior to the murder. This information is so inconsequential in relation to the rest of the evidence that it cannot be said that the result of the proceeding would have been different had Regan known; therefore, no prejudice is demonstrated.

5. Regan's failure to interview the eyewitnesses of the shooting was erroneous and prejudiced Kyles, the defendant claims. The Court finds no merit in this argument. Regan had more than adequate opportunity to cross-examine three of the eye-witnesses at the motion to suppress – when all were under oath.[10] His election not to

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[10] Regan cross-examined Isaac Smallwood, Henry Williams and Robert Territo at a motion to suppress held on November 6, 1984, all of whom testified at trial. Only Darlene Cahill, the fourth trial eye-witness was not questioned and that is because she had not participated in the photographic line-up at issue therein.

The Court notes that the identifications made by each of these persons was absolute. Much has been made over Smallwood having embellished his recounting of what he saw on the

further interview them or obtain statements was not unreasonable and appears to have been in the nature of a reasonable, tactical decision on the part of defense counsel that the court will not second guess. In addition, Kyles has not presented how such witness interviews would have resulted in a different trial outcome. The trial in question was fundamentally fair.

6. Kyles claims that counsel should have demanded an *in camera* review of the homicide file. This entire claim is based on hindsight and as such is not subject to review by the Court. Furthermore, considering that the Court has previously ruled that the failure to turn over this *Brady* material did not result in Kyles receiving an unfair trial, this claim is without merit.

7. Kyles argues that counsel was "patently ineffective in allowing the state to hide such significant evidence" as the taped conversation. As this court has stated, this "taped conversation" looked at in the light of all of the other evidence adduced at trial and at the post-conviction hearing, is not the "smoking gun," as defense counsel insists on characterizing it. In addition, this is yet another "hindsight" call which the court will not consider.

8. Counsel was ineffective because he did not advise two of the defense witnesses to go to the police or

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day of the shooting at trial. However, comparing his statement, his testimony at the hearing on the motion to suppress, and the testimony at trial, this court believes that at a minimum this individual was able to see the perpetrator's face and that the identification is valid. Smallwood's embellishment is not prejudicial error.

the district attorney with "information . . . that Beanie was the murderer of Dolores Dye" which information counsel learned "at least two weeks after Curtis' arrest." This assertion by Kyles overstates at best, or misstates at worst, what this court can glean from the record.

The citations provided by counsel to support this claim do not deal with these two persons having informed Regan two weeks after Kyles' arrest that Beanie was the murderer of Dolores Dye. The Regan testimony of February 20, 1989, at the Post-Conviction Hearing beginning at page 17 deals with Beanie's allegedly having murdered two other people. Kevin Black's entire testimony consists of his having seen Beanie in the Dye car immediately after the shooting. Johnny Burnes most incriminating statement at trial about Beanie was that he saw Beanie placing something behind the stove at the now infamous Sunday night dinner.

To begin the analysis, the criminal trial court found that Johnny Burnes testimony is totally without merit or worthy of consideration because of his demeanor in court and because he had been convicted of the murder of Beanie. This court concurs in this finding. Both Burnes' trial testimony and post-conviction hearing testimony are incredible. It was not until this post-conviction hearing (which occurred after Beanie's demise) that Burnes thought about retrieving from his memory the "fact" that Beanie told him that Beanie had killed Mrs. Dye. Indeed, Sergeant Raymond Miller, who took Burnes' statement about Beanie's involvement with another (the Leidenheimer) murder, believed from Burnes' statement that Burnes himself was involved in that murder. (Post

Conviction Hearings, Raymond Miller, March 3, 1989, at 46-47).[11]

As to Black's testimony, again the court cannot find that his being "discredited" by the fact that he did not go to the police had an effect on the fairness of the trial in light of the totality of the evidence adduced. Petitioner has not proven any prejudice resulted from the alleged error of counsel.

9. In petitioner's memorandum of facts and law, not in the petition itself, Kyles finally argues that Regan's failure to interview Beanie himself was error. However, this decision was one which was rationally made by a competent defense lawyer. Beanie was considered by Regan to be the proverbial "loose cannon." Considering that Regan's entire defense hinged on pinning the murder on Beanie, it is difficult to comprehend how interviewing Beanie would have made any appreciable difference. Surely, Kyles could not have expected a Perry Mason confession from Beanie had Regan interviewed him. This "error" was not prejudicial.

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[11] Miller testified concerning why he held this belief as follows:

> It was the information that, ah, he [Johnny Burnes] knew the caliber of the weapon. He knew the location of the wound, and most importantly, he knew the fact that a television had been moved from one location to another inside the downstairs's living room of the residence. That particular information in particular was never released to anyone, because I failed to put it in the initial daily by an oversight. So that particular information was not known to any one other than someone who would have been there that night.

B. Ineffective Assistance During Trial

1. A major issue raised in petitioner's post-conviction motions heard before Judge Waldron, repeated here, is that it was ineffective of counsel not to call Beanie to the stand. Regan has opined that he did not do so because he misunderstood Louisiana law on that issue at the time; he believed he would have to prove both hostility and surprise in order to lead Beanie if he called him. (Post-Conviction Hearing, Regan Testimony, February 20, 1989, at 23-24).

Louisiana Revised Statute 15:277 provided at the time of Kyles' trial:

> A leading question is one which suggests to the witness the answer he is to deliver, and though framed in the alternative, is inadmissible when propounded to one's own witness, unless such witness be unwilling or hostile. Louisiana Revised Statute 15:487 also provided at that time: No one can impeach his own witness, unless he has been taken by surprise by the testimony of such witness or unless the witness shows hostility toward him, and, even then, the impeachment must be limited to evidence of prior contradictory statements.

It was only after the Louisiana Supreme Court, in dicta, stated that "Wallace [Beanie] was clearly a witness hostile to defendant, and defense counsel was entitled to employ leading question and to impeach the witness through any prior inconsistent statements. La.R.S. 15:277; 15:487" that Regan's decision was called into serious question.

The Louisiana court's statement does not mean that the statutory requirements would not have to have been met by Regan. Had Regan put Beanie on the stand, he would not have been able to impeach him until Regan was either surprised by the testimony or Beanie demonstrated hostility. *State v. Nuccio*, 454 So.2d 93 (La.1984); *State v. Rogers*, 324 So.2d 404 [403] (La.1975). At the time Regan was called upon to make the decision as to whether or not to call Beanie, Regan had no guarantees as to Beanie's demeanor or testimony. He made a logical decision which this court feels was justified at the time.

The possibility of the defense calling Beanie was actually considered by Regan and discussed with the prosecution. At the postconviction hearing, prosecutor Cliff Strider in responding to the question whether Regan indicated to him whether Strider thought he would or would not call Beanie as a witness testified:

> He was debating that point. I remember that there was a discussion. I told him that I would love to get Beanie under cross-examination, and he made a remark about how that he would be able to do that, and so we'd both have him under cross-examination. There was a discussion –. . . . He made a remark about that Beanie would be hostile because he was going to be accusing him of the murder, and that he would be able to – I told him that I didn't think Beanie would get hostile. I didn't think that Beanie would get upset.

(Post-Conviction Hearing, Testimony of Strider, February 20, 1989, at 117.[)]

Considering the possible damage that Beanie's testimony could have wrought and considering that much of the "evidence" of Beanie's character and activities presented was based on questionable hearsay, this court believes that Regan made a tactical decision that was reasonable and well advised at the time that he decided not to place Beanie on the stand. This court must

> indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 690, 104 S.Ct. at 2065.

In addition, the essence of the state's case did not rely at all on Beanie; it was founded on the positive identification by four eyewitnesses who saw Curtis Lee Kyles at varying stages of the incident calmly placing a gun to the head of an unarmed woman, blowing her brains out (for absolutely no other reason than to rob her), and then driving away in her car. The court cannot find that the decision reached would reasonably likely have been different had Regan cross-examined Beanie.

2. Kyles alleges that counsel was ineffective because he failed to obtain the services of an eye-witness expert to prove that the identifications were suspect. At page 94 of Regan's February 20, 1989, post-conviction hearing testimony, he states that he did not know of any case in the year 1984 in which an expert in eye-witness identification was used in the Criminal District Court for Orleans Parish. In light of that testimony, it borders on frivolous to raise such a claim under the dictates of *Strickland*.

Because it was not the practice of the legal community in 1984 to use these experts, and their use was, therefore, without precedent at that time, Regan cannot be found to have been ineffective by not doing that which had never before been done.

3. Likewise, Kyles' argument that Regan should have impeached Smallwood, the eyewitness who embellished his story on the stand, with his prior statement is without merit. Regan did not know of it; therefore, an ineffective assistance of counsel claim in this regard is without merit. Furthermore, since the "*Brady*" evidence was found not to be material, its non-use could not present an ineffective assistance of counsel claim.

4. Kyles makes the broad-brush allegation that counsel's failure to interview all of the eye-witnesses constituted ineffective assistance. This claim fails to detail with particularity what prejudicial impact that failure produced, and therefore Kyles does not raise a cognizable claim.

5. Kyles claims as ineffective assistance Regan's failure to call Detective John Miller, the detective who met with Beanie, to the stand. During the post-conviction hearing, Detective Miller was called to testify. There was no testimony elicited from him that would have in any way diminished the state's case against Curtis Lee Kyles. Accordingly, no prejudice has been demonstrated by Kyles; this claim also fails.

6. The next claim is based upon counsel's alleged failure to properly argue the State's objection to Ronald Gorman's testimony as hearsay. At the trial Gorman testified that Beanie had attempted to sell Mrs. Dyes' car to

Gorman. Gorman also had been convicted "on a marijuana charge" and "armed robbery that they broke it down to purse snatching." Trial Transcript at 238-39. Indeed, Gorman testified how different Beanie and Kyles appear. Trial Transcript at 244.[12]

Kyles does not specifically outline exactly what testimony Gorman would have given. He notes that "[h]owever, had trial counsel noted that a statement against penal interests is an exception to the hearsay rule, the statements made by Beanie to Ronald Gorman would have been admissible." Petitioner gives no specifics, and on that basis the court rejects this contention.

In addition, in reviewing the trial testimony and the post-conviction testimony with respect to Gorman, Gorman was a convicted felon whose testimony was and continues to be suspect. Therefore, the court cannot find that Kyles was prejudiced by Regan's "failure" in this regard.

7. Kyles raises a similar objection with regard to Johnny Burnes testimony and counsel's failure to raise an exception to the hearsay rule. The trial court stated after the post-conviction hearing:

> This Court, having had the opportunity to view Mr. Burnes on the witness stand and to hear his testimony, has chosen to totally disregard everything that he has said. Purely by coincidence, this Court has presided over the trial of Mr. Burnes, wherein he was convicted of the killing of Joseph Wallace [Beanie].

Judgment dated November 9, 1989, at 4.

[12] Gorman was one of the individuals who went to the police after the first trial and gave a statement concerning Beanie and the Leidenheimer murder. In the statement, Gorman admitted that he had known of the Leidenheimer information for a number of months but had decided to tell the police only then because Beanie supposedly threatened to murder him if Gorman testified at trial.

The trial court's finding of fact in this regard cannot be set aside unless it is clearly erroneous. The court must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Amedeo v. Zant*, 486 U.S. 214, 223, 108 S.Ct. 1771, 1777 [100 L.Ed.2d 249] (1986). Having reviewed the entire record, this court without hesitation concurs with the trial court's determination concerning the credibility of Johnny Brown.

Burnes still denies that he killed Beanie, and testified at Kyles' post-conviction hearing that the prosecutor, Mr. Strider, whispered to Burnes outside the courtroom, "He told me whatever they had to do to get me, they was going to get me, too." (Post-Conviction Hearing, Burnes' Testimony, March 1, 1989, at 54). Even at the trial, before Beanie's murder, Burnes' testimony is uneven and unbelievable.

Based on these findings, there can be no prejudice with regard to any testimony that Burnes was precluded from giving.

8. Kyles opines that counsel failed in providing assistance when Regan did not object to the introduction of a picture and its blowup which purportedly shows Kyles' car in the Schwegmann's parking lot at the time of the murder. It is simply yet another *ex post facto* claim

which has no merit as the basis for an ineffective assistance claim. The gravamen of petitioner's argument is that the police record of the license plates supposedly demonstrates that Kyles' car was not in the parking lot at 9:15 p.m., the night of the murder.

As noted earlier, at the post-conviction evidentiary hearing it was established that the list did not contain the license plate numbers of every car in the lot. Furthermore, even if this list were conclusive, Regan did not even know of the list at the relevant time.

9. Petitioner continues to claim ineffective assistance by arguing that counsel's failure to object to Detective Dillman talking about two other witnesses "probably persuaded the jury that there were more witnesses who could identify the defendant." (Trial testimony at 88). This claim is totally unsupported by the record. The two other witnesses are Willie Jones and Edward Williams. These two persons participated in the photographic lineup, but were unable to make a positive identification, only a tentative one, as specifically stated by Dillman at trial. He also testified that they did not make a negative identification, that is identify someone else. Furthermore, this "failure could not be deemed to have resulted in Kyles' receiving a fundamentally unfair trial when four eye-witnesses testified unequivocally that Kyles was the perpetrator of the crime.

10. Kyles argues that Regan was ineffectual when he failed to object during the sentencing phase to a comparison of Kyles' life while incarcerated to the Dye's family life subsequent to the murder of Mrs. Dye. This "failure" does not constitute constitutional grounds to

vacate the sentence. Under the Supreme Court's ruling in *Payne v. Tennessee*, ___ U.S. ___, [___], 111 S.Ct. 2597, 2606-08 [115 L.Ed.2d 720] (1991), it is not unconstitutional to introduce at the sentencing stage information concerning the impact on the victim's family because of the victim's death. "We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm cause by the defendant." *Id.*

11. Kyles' last contention is that counsel was ineffective for his "failure to investigate the possibility that Kyles' has organic brain damage or mental illness." First, counsel has not presented evidence that Kyles' suffering from:

> considerable inter- and intra-test scatter. Deficiencies appear in areas of perceiving and mobilizing information in the environment, academic knowledge, abstract reasoning and short-term memory.

(Petition at 47) would affect his capacity to stand trial or to be sentenced as he was. Second, there is no evidence of any facts or triggering events which would have alerted Regan to the desirability of ordering such tests. Counsel testified that Kyles was lucid and perfectly capable of understanding everything that went on at trial and assisting counsel at that time. "He was certainly sane and capable of assisting me." (Post-Conviction Hearing, Testimony of Regan, February 20, 1989, at 61). Regan was privately retained counsel, working within a budget. *Id.* at 62. Taking all of this into consideration, counsel's not

ordering those kinds of tests was reasonable under prevailing professional norms at the time.

C. Ineffective Assistance Following Trial

1. Kyles alleges that had Regan "kept in contact with Curtis' family during the appeal of the conviction and death sentence, he would have learned that Beanie admitted to Martina Burnes and Johnny Burnes that Beanie killed Dolores Dye." The court has already expressed its findings with respect to Johnny Burnes' testimony. The court finds Martina ("Pinky") Burnes' "new" information equally incredible. She testified at the post-conviction hearing, responding specifically to the court's question,[13] that Beanie told her before Curtis was convicted that Beanie had shot Mrs. Dye. (Post Conviction Hearing, Martina Burnes' Testimony, April 7, 1989, at 17-18). Certainly, it belies belief that had Pinky had this information at the time of trial that she would not have been forthcoming with it. Inherent in this claim also is the idea that defense counsel should continue "post-trial working" of evidence, a concept which, at the very least is novel, if not absurd. Surely, the burden of producing favorable or changed post-trial circumstances should rest with the defendant's family, not with his lawyers. They are advocates, not companions or sitters. This claim is without merit and warrants no more discussion.

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[13] As stated previously, Regan did not call her at trial because he was uncomfortable with her testimony and attitude even though the defense's version hinged on the theory that Beanie framed Kyles in order to get Pinky.

2. Kyles' final assignment of error in relation to the ineffectiveness of counsel is that he "could have also called Detective Ray Miller to the stand during a hearing on a motion for new trial on the basis of newly discovered evidence" – that being Beanie's confession about being present at the scene of the Leidenheimer murder. What this evidence has to do concerning new evidence in relation to Kyles' murdering Mrs. Dye is beyond this court's independent comprehension and is neither explained nor amplified by counsel. Beanie never took the stand. Beanie's testimony and good character were not an issue. Beanie supplied a name. That is virtually all he did.

In summary, with respect to all of the ineffective assistance of counsel claims, Kyles has not demonstrated that he was prejudiced by any of these alleged "errors," nor did Regan's defense fall below the standard required. Kyles receives a fair trial a jury found him guilty beyond a reasonable doubt, did so on the basis of facts properly presented to it, and had ample evidence presented to it to do so.

IV. Other Errors in Trial Court

In addition to the foregoing, petitioner raised seventeen other "errors" which the trial court allegedly committed.

A. Kyles claims that the trial court erred when it did not appoint, without being asked, another attorney for the sentencing phase of the trial. To begin, Regan was not appointed counsel, so it is unclear why the trial court

should interject itself into the business of retained counsel in that manner. Furthermore, as support for this proposition, Kyles asks the Court to look to *State v. Williams*, 480 So.2d 721, 728 n. 14 (La.1985), a case decided after this trial in which the court noted the possibility of a court appointing separate counsel for the sentencing phase of the trial. Neither statutory law not the Louisiana Supreme Court mandate it. Furthermore, petitioner simply states in a conclusory way that this non-appointment violated Kyles' Sixth, Eighth and Fourteenth Amendment rights but does not specify how. Without specificity, the Court cannot address this allegation.

B. Kyles claims his Sixth, Eighth and Fourteenth Amendment rights were violated when his garbage was seized as the result of information given by an unreliable source. The petitioner was given a full and fair hearing based on a motion to suppress. As discussed earlier, petitioner had no reasonable expectation of privacy in the garbage; therefore, no constitutional error was committed when its contents, those being the victim's purse and belongings, were introduced at trial. Furthermore,

> where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Stone v. Powell, 428 U.S. 465, 482, 96 S.Ct. 3037, 3046 [49 L.Ed.2d 1067] (1976). This claim is without merit.

C. Kyles complains that the trial court clearly erred in precluding answers from Detective Miller regarding

his knowledge about Beanie's offering the victim's car for sale and stating whether he had changed the license plate. Counsel at trial did not object to the trial court's evidentiary ruling, nor did counsel offer the justification that the testimony was admissible not for the truth of the statement, but for the proposition that the statement had been made.

This court must remember its role in reviewing the evidentiary rulings of state convicting courts. An evidentiary error in state criminal trial justifies habeas corpus relief only if the error is such that it renders the petitioner's trial fundamentally unfair. *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir.1984). An unfair trial is one that has been largely robbed of the dignity due a rational process. *Menzies v. Procunier*, 743 F.2d 281, 288 (5th Cir.1984). A state defendant has no constitutional right to an errorless trial. *Bailey*, 744 F.2d at 1168.

In Kyles' case in chief, the allegation that Beanie offered the car for sale after the murder was raised by Ronald Gorman (Trial Transcript at 234), and the allegation that Beanie changed the license plates was elicited on direct examination of Johnny Burnes. (Trial Transcript at 260). Thus, the jury was presented with these theories. Looking at the totality of the evidence presented and the manner it was introduced, the evidentiary rulings did not result in a fundamentally unfair trial.

D. Kyles opines that the failure of the trial court to voir dire the prospective jurors individually and privately tainted the venire when prospective jurors Gros and Miller stated that they believed the defendant was guilty. First, petitioner does not indicate that counsel ever

made such a request, nor can this court locate such a request in the approximately 200-page voir dire transcript. Second, the citation of pages 92 and 93 in relation to "Gros' " testimony is not correct since the testimony of neither a Mr. nor Ms. Gros appears at those pages. Third, a review of the voir dire of Mr. Miller provides the clear view that Mr. Miller agreed that Kyles was innocent until proven guilty. Finally, there is no constitutional guarantee of individual voir dire. *See Wingo v. Blackburn*, 783 F.2d 1046, 1051-52 (5th Cir.1986); *Salemme v. Ristaino*, 587 F.2d 81, 88 (1st Cir.1978).

E. Kyles claims that his right to a fair trial and sentence were violated "by making reference to Kyles' alleged infidelity to his common law wife." Petitioner gives no specific reference where the "cheap shot" occurred; however, Kyles himself testified that he had another girlfriend. This court finds it impossible to say that Kyles was denied a fundamentally fair trial because of any such reference when it was a fact testified to by the petitioner himself. (Trial Transcript at 331).

F. Petitioner claims he did not receive a fair trial when the prosecutor argued that none of the jurors would feel safe shopping at Schwegmann's. Trial counsel made an objection and it was sustained; however counsel failed to ask that the jury be admonished to disregard the statement.

The trial court instructed the jury at the end of the guilt phase that:

> the opening statement of the District Attorney, as well as the opening statement of the defense attorney, as well as all of their closing arguments, as well as all of the questions that they have asked during this trial, as well as all of their comments during this trial, are not in any way to be considered by you as evidence in this case.

Such a prophylactic instruction cures the alleged violation. Furthermore, the failure to admonish given the circumstances of the trial still would not result in a fundamentally unfair trial.

G. Kyles next raises the identical type of objection but in regard to the sentencing phase concerning a reference to Kyles' being able to watch cable television if sentenced to life at Angola. This court has not been able to find in the record that a similar prophylactic instruction was given; however, the Louisiana Supreme Court observed that a review of the closing argument in its entirety led it to conclude that the prosecutor's improper remarks did not render the jury's sentencing recommendation unreliable. *State v. Kyles*, 513 So.2d 265, 275 (La.1987). This court concurs with the Louisiana high court's findings and will not disturb them.

H. Kyles claims that because the "sentencing paragraph of the relevant article states that the jury's decision is a 'recommendation' when in fact it is a mandatory sentence," the statute is unconstitutional, and the jury was mislead concerning the finality of their decision. This argument belies the instructions which Judge Waldron gave. In the case at bar, it is clear that the jury was apprised of the fact that its finding that Kyles should be sentenced to death would result in the imposition of that penalty. One of the statements made to that end (and the

instructions are replete with similar statements) is as follows:

> Only if you find beyond a reasonable doubt that the aggravating circumstance outweighs any one or more mitigating circumstances and you are convinced beyond a reasonable doubt that the sentence of death is appropriate, may you impose that sentence. (emphasis added).

Nowhere in the instructions, is the jury given the impression that their verdict would simply be a "recommendation." Therefore, no constitutional right was violated.

I. In the sentencing phase, a juror asked the trial court whether a life sentence without benefit of parole, probation or suspension of sentence was "exactly carried out." Kyles argues that because the judge simply reiterated what the standard of proof for the finding of a sentence of death rather than directly answering the question "was misleading and deprived Curtis of fair sentencing hearing, violating his rights. . . . "

Under Louisiana jurisprudence, the trial court responded in a proper manner. *State v. Copeland*, 530 So.2d 526, 538 (La.1988), citing *State v. Lindsey*, 404 So.2d 466, 487 (La.1981), *after remand*, 428 So.2d 420 (La.1983). "A discussion of future remedial measures increases the potential for arbitrary decision making by the jury and is irrelevant to the jury's duty. Thus, there is almost a blanket prohibition of these matters."

The trial court's response was not prejudicial and did not result in a fundamentally unfair trial. Indeed, if the trial court had done otherwise, it could well have committed error. The trial court adequately informed the jury

of its option to sentence the petitioner to either life imprisonment or death. *Evans v. Thigpen*, 809 F.2d 239, 243 (5th Cir. 1987). As such, the court's response was not prejudicial. This claim is devoid of substance.

J. Kyles claims his constitutional rights were violated because the first degree murder statutory scheme does not allow for a separate jury to be chosen for each phase of the trial based on his contention that such a scheme "would allow jurors who are opposed to the death penalty to serve during the guilt/innocence phase, if otherwise qualified." The court finds neither statutory sanction nor constitutional justification for such a proceeding. In addition, other than offering an unsupported, if not interesting, theory of his perceptions of enhanced jurisprudential practice, petitioner does not demonstrate how the absence of such a "two jury" trail prejudiced him. The jury selection was fundamentally fair and the fact that those who do not believe in the death penalty were excluded from the guilt phase of the trial raises an issue that is wholly speculative in its nature and does not meet constitutional proportions. Furthermore, this issue was not raised in a petitioner's initial appeal and is arguably waived.

K. Kyles claims that he was deprived of a fair sentencing hearing because the prosecutor appealed in numerous ways to the passions of the jury. The Louisiana Supreme Court examined the record of the sentencing phase to determine if it was constitutionally excessive.

> In making this determination, the court considers whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the evidence supports

> at least one statutory aggravating circumstance; and whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the offender and the offense.

Kyles, 513 So.2d at 273. While the state supreme court recognized that the closing was surely undesirable, if not improper, in a number of ways, the court was unable to conclude that the prosecutor's improper remarks rendered the jury's sentencing recommendation unreliable. *Kyles*, 513 So.2d at 275.

This court having reviewed the record concurs with the Louisiana Supreme Court. Some of the objectionable comments refer to what have become known as "victim impact statements." In *Payne v. Tennessee*, ___ U.S. ___, [___], 111 S.Ct. 2597, 2609 [115 L.Ed.2d 720] (1991), the United States Supreme Court held that the Eighth Amendment does not establish a per se bar to the introduction of victim impact evidence where the State chose to permit the admission of victim impact evidence and prosecutorial argument. This court believes that the statements made taken in the context of the whole did not render the verdict unreliable.

The jury found an aggravating circumstance which is sufficient under the Louisiana scheme to sentence Kyles to death. Based on the record in its entirety, the evidence was overwhelming of Kyles' guilt. There was little cause for doubt based on the four eyewitnesses' testimony that this defendant needlessly and with total disregard for the victim literally blew her brains out. There was little, if any, mitigating evidence. Even if the argument was inappropriate, it did not make the sentencing hearing unfair.

See Kirkpatrick v. Blackburn, 777 F.2d 272, 283-84 (5th Cir.1985).

L. Kyles contends that the prosecution argued that the alternative to the death sentence was only "life imprisonment" not mentioning that it would be without benefit of parole, probation or suspension of sentence. This claim disregards the very explicit instructions of the trial judge at the sentencing stage, disregards the very nature of closing arguments, and would cast the prosecution in the role of an apologist, which is neither his duty nor his purpose. The claim has no merit.

M. The petitioner argues that the death penalty was arbitrarily and capriciously imposed on him because the mitigating factor of "no significant prior criminal record" was present and because "no aggravating circumstances existed other than that required to be proved in order to convict the petitioner of the a (sic) murder." Surely, the state proved that which the law required it to prove; that the jury elected to forego Kyles' wish for more merciful consideration raises no federal constitutional issue. In *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir.1986), the United State Court of Appeals for the Fifth Circuit stated:

> We fail to see why aggravating circumstances narrow the sentencing discretion any less by being made a constituent element of the crime. The State of Louisiana is entitled to authorize capital punishment for persons guilty of these aggravated acts where the jury does not find that mitigating circumstances justify less than the death penalty.

See Lowenfield v. Phelps, 817 F.2d 285, 289 (5th Cir.1987), *aff'd*, 484 U.S. 231, 108 S.Ct. 546 [98 L.Ed.2d 568] (1988). Petitioner raised yet another baseless claim.

N. Kyles claims that his constitutional rights were violated when two defense witnesses, Kevin Black and Johnny Burnes, were threatened by the prosecutor with being charged with accessory after the fact to first degree murder. Kyles contends that after the trial court informed them of this problem and instructed them on their Fifth Amendment right against self-incrimination, the demeanor of the two witness [sic] changed radically and their effectiveness was diminished.

This court rejects this argument as did the Louisiana Supreme Court in Kyles, 513 So.2d at 271. As stated before, Johnny Burnes' testimony is simply not credible under any circumstances, without any reference to his demeanor. Kevin Black testified that he saw Beanie in the Dye car between 3:15 and 3:30 p.m. on the day of the murder and the Beanie had his hair fixed in braids or plaits at the time. (Trial Testimony at 208-09). In relation to all of the other evidence and testimony adduced, these witnesses' demeanor would not have caused the outcome of this trial to be suspect. In addition the Louisiana Supreme Court found that if Beanie had provided the prosecutor "information . . . indicating that Burns and Black facilitated defendant's attempts to avoid apprehension and destroy evidence, the prosecutor had a legitimate basis for considering prosecution under the accessory statute, La.R.S. 14:25 or the obstruction of justice statute, La.R.S. 14:130.1." *Kyles*, 513 So.2d at 272 n. 6.

At the post-conviction hearing, Prosecutor Strider outlined the state's theory of the case as follows:

> Because what happened was that Curtis Kyles shot that lady, he took her car to . . . Kevin Black's apartment, and there is a place where you can park an automobile that you can't see it – behind Mr. Black's apartment, you can't see it unless you're standing right there. He then got, I believe Mr. Black, to drive him over to his house. They goofed off there for a little bit. Then they got Johnny Burnes to take Black, Burnes, Kyles and Beanie back to the parking lot where the car was, and Burnes went in an picked up the car, Kyles' car. And Black and Kyles and Beanie waited . . . in the other parking lot while Johnny went over and picked up the car and drove it to Black's apartment complex, where they swapped the groceries from one car to the other car.

(Post-Conviction Hearings, Strider's Testimony, February 20, 1989, at 128-129). There was reason for Strider to ask for the court's intervention. This court cannot find constitutional error in the actions of the trial court.

O. Kyles claims that his rights were violated because the pro bono attorney appointed by the Louisiana Supreme Court has no previous experience in death penalty post-conviction relief cases. The claim is without merit considering that Gerard A. Rault, Jr., who is a professor of criminal law at Loyola Law School in New Orleans, Louisiana, is listed as "of counsel" on the pleadings and participated in the post-conviction hearings. Kyles has been well represented; he received a fair trial

for the tragic murder of Mrs. Dye. He asserts his innocence in the face of overwhelming evidence. No attorney, no matter such attorney's brilliance and experience, can change the facts of a case.

P. Kyles claims that his sentence of death is "invidiously discriminatory" because of Louisiana's prosecuting authorities, court, juries and governors' pattern and practice of discriminating on the basis of race, gender and poverty in the administration of capital punishment. Kyles has offered no proof that a constitutionally significant element of racial or economic bias infects the Louisiana scheme. *McClesky v. Kemp*, 481 U.S. 279, 313, 107 S.Ct. 1756, 1778 [95 L.Ed.2d 262], *reh'g denied*, 482 U.S. 920, 107 S.Ct. 3199 [96 L.Ed.2d 686] (1987). However, even assuming that such bias is present, Kyles has offered no proof that the Louisiana legislature maintained a death penalty because of an anticipated racially or economically discriminatory effect. *Id.*, 481 U.S. at 297-98, 107 S.Ct. at 1769; *Brogdon v. Blackburn*, 790 F.2d 1164, 1170 (5th Cir.), *reh'g denied*, 793 F.2d 1287 (5th Cir.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1985 [95 L.Ed.2d 824] (1987). Accordingly, this claim is devoid of substance.

Q. Kyles claims that the cumulative effect of all these alleged "errors" resulted in the end effect "which is clearly harmful and which jointly and cumulatively deprives Curtis of his constitutional rights. . . . " First, this court has found that none of petitioner's claims has merit; therefore, there is no error to accumulate. "Zero times twenty is still zero." *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir.1987).

However, the Fifth Circuit has recognized cumulative error analysis in a habeas case. *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir.1991). The circuit has instructed:

> The sole dilemma for the reviewing court is whether the trial taken as a whole is fundamentally unfair. When a trial is fundamentally unfair, "there is a reasonable probability the verdict might have been different had the trial been properly conducted."

Id. (citations omitted).

This court is convinced that even if one considered all of the "errors" cumulatively, the jury's verdict would have been the same. For the sake of argument, consider that Isaac Smallwood's eyewitness testimony had been impeached, there remain three disinterested eye-witnesses who identified Kyles – regardless of hair-style – as the man they saw kill Mrs. Dye or drive away in her car. These witnesses were given the opportunity (as was the jury and the trial court) to physically compare Curtis Kyles and Beanie. If there had been a reasonable doubt as to whether Beanie and Kyles could have been confused with one another, the verdict undoubtedly would have been different. As noted before, even Kyles' own witness stated that the two individuals' builds are so different that one could not confuse the two.

The court examined all of the pictures used in the photographic line-up and compared Kyles' and Beanie's pictures; it finds that they did not resemble one another. Furthermore, the argument concerning whether the attacker had plaits, braids, a Jheri curl, or a bush is ludicrous. The photographic identifications were made using a picture of Kyles with a bush haircut. It was his

face these witnesses recognized; these witnesses had been close enough to see and remember his face.

The allegedly cumulative effect of the claimed "non-errors" cannot change the clearly untainted evidence that was introduced. That evidence alone leads clearly and inevitably to the conclusion that Kyles killed Mrs. Dye in cold blood, in the course of an armed robbery. No amount of irrelevant technicalities can change that result.

Kyles got a fair trial – not simply a fundamentally fair trial, but a *clearly* fair trial.

V. Error in the Supreme Court

Petitioner argues that the Louisiana Supreme Court erroneously concluded that Beanie testified at trial which he did not. Petitioner has not demonstrated that the court's error prejudiced him, and on review of the entire trial record and post-conviction hearing, the court finds that Kyles has received treatment throughout his trial and post-conviction relief that passes constitutional muster.[14]

VI. Error in the Evidentiary Hearing

Kyles' final argument is that his right to a complete evidentiary hearing was "undermined when the trial

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[14] The court would note, in passing, that it understands how such an error could occur. The record in this case is confusing, at best, and possibly misleading, at worst, even with careful study. While briefing was generally voluminous, it often afforded little help in unraveling, and was often the source of obfuscation, as to the procedural and factual background of Kyles' trial.

court refused to permit Curtis, who was found to be impecunious, funds with which to hire experts and investigate by means of civil discovery." Kyles presents neither statutory authority nor constitutional mandate for such hiring of experts. But of equal importance, he offers no reason why in this instance the trial court should have provided such funds: Kyles presents no indication of what kind of experts he believed would have been helpful; the kind or nature of the evidence such experts would have produced; or what effect that "expert" evidence would have.[15] Furthermore, there was expert testimony by Mr. Dalton concerning the effectiveness of counsel claims. Ms. Hillary Murphy, who technically may not be an "expert," nevertheless presented evidence in regard to the identification of Kyles and Beanie. The fact of the matter is that the evidence was overwhelming; the court does not believe that any "expert" testimony could dissuade the court of its belief in the fairness of this trial or the propriety of the results reached by the jury.

Conclusion

Curtis Lee Kyles stands convicted of a senseless and brutal murder of an elderly woman committed during an armed robbery. He has been sentenced to death after due deliberation by a fair and impartial jury. This court in

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[15] If indeed Kyles is again raising the argument that an eyewitness expert should have been hired, the court reiterates that such practices were not the norm at the time of Kyles' trial and the failure to fund the hiring of an expert does not rise to the level of a constitutional deprivation of Kyles' rights in this instance.

reviewing the entire record believes that he received a fundamentally fair trial and that the verdicts rendered at both the guilt phase and the sentencing phase of this trial are not suspect. Kyles has been afforded justice concomitant with that which is required under the United States Constitution, and is therefore not entitled to the relief of the Great Writ. Accordingly,

IT IS ORDERED Curtis Lee Kyles' Petition for Writ of Habeas Corpus is DENIED.

The stay of execution will be lifted by separate order.

APPENDIX B

Curtis Lee KYLES

v.

John WHITLEY, Warden Louisiana State Penitentiary, Angola, Louisiana.

Civ. A. No. 90-4301.

United States District Court, E.D. Louisiana.

June 1, 1992.

ARCENEAUX, District Judge.

ORDER AND REASONS

A motion and memorandum in support of petitioner's relief from judgment pursuant to Fed.R.Civ.P. 60(b)(2) and (6) has been filed by petitioner Curtis Lee Kyles. Having reviewed the memorandum and affidavit of Darlene Kersh (who was known at the time of Kyles' trial as Darlene Cahill), the court finds that petitioner's motion to be meritless.

Ms. Kersh was one of four eye-witnesses who made a positive identification of Kyles at trial and was the only witness who had not identified Kyles in a photographic line-up. Ms. Kersh now avers that she never actually saw Kyles' face and testified untruthfully at the behest of the police and the district attorney's office. Petitioner claims that this information "undermines the entire premise of this Honorable court's conclusion that Mr. Kyles received a fair trial based upon eyewitness testimony."

This court entered judgment on petitioner's motion on March 30, 1992, and petitioner filed his notice of appeal on April 2, 1992.He now moves the court for relief based on the affidavit of Darlene Kersh.

Standard of Review

Rule 60(b)(2) and (6) provide:

> On motion and upon such terms as are just, the court may relieve a party . . . from a judgment, order, or proceeding for the following reasons: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[; . . .] and (6) any other reason justifying relief from the operation of the judgment.

In this instance, with the appeal pending, this court does have jurisdiction to consider the motion and deny it on the merits without obtaining leave of the court of appeals. The United States Court of Appeals for the Fifth Circuit has held that:

> When a Rule 60(b) motion is filed while an appeal is pending. this circuit, along with other

> circuits and the commentators, has expressly recognized the power of the district court to consider on the merits and deny a 60(b) motion filed after a notice of appeals, because the district court's action is in furtherance of the appeal.

Willie v. Continental Oil Co., 746 F.2d 1041, 1046 (5th Cir.1984), citing *Lairsey v. Advance Abrasive Co.*, 542 F.2d 928 (5th Cir. 1955 [1976]).

The court finds that this new claim constitutes an abuse of writ which precludes the court from reviewing this claim. Petitioner has failed to provide the court with an adequate demonstration that he exercised due diligence to discover the evidence which he presents to this court as "new." While the affiant Kersh may not have had a telephone number listed as Darlene Cahill, there are other avenues using public records by which petitioner could have located this witness prior to his filing his first habeas petition. The petitioner has failed to show that he was impeded by some objective factor external to the defense such as governmental interference or the reasonable unavailability of the factual basis for the claim which prevented him from raising this claim. *McClesky v. Zant*, [499 U.S. 467, ___], 111 S.Ct. 1454, 1473 [113 L.Ed.2d 517] (1991).

Furthermore, even if the Kersh affidavit were true, such evidence would not have affected the jury verdict in this case. Her testimony was cumulative and in the context of the entire trial transcript, rather inconsequential. Given the totality of the evidence and the remaining three eye-witnesses who chose Kyles out of a photographic line-up and who were cross-examined by Kyles' counsel

during a motion to suppress, the court is not persuaded that Kyles did not receive a fundamentally fair trial. While Ms. Kersh's affidavit is disconcerting in that perjured testimony given at the urging of the government in such a prosecution must not be countenanced, Ms. Kersh's testimony was of little consequence in relation to the other eyewitnesses and the evidence found in Kyles' girlfriend's apartment.

Finally, under section 2254(b), a prisoner must first exhaust his state remedies prior to raising that claim in federal court. *Rose v. Lundy*, [455 U.S. 509] 102 S.Ct. 1198 [71 L.Ed.2d 379] (1982). This new "evidence" really is a new and independent basis for relief which has never been presented to the state court. As such, this court cannot grant the relief requested. Accordingly,

IT IS ORDERED that plaintiff's Rule 60 motion is DENIED.

CRIMINAL DISTRICT COURT,
PARISH OF ORLEANS

LOUISIANA No. 303-970
Section F
V.
CURTIS LEE KYLES

The following is the statement of Isaac Smallwood,n/m 12-24-49, residing at 3313 Saratoga St. relative to his knowledge in the fatal shooting of an unk.w/f, in the 5300 Blk. of Old Gentilly Rd. which occured on 9-20-84 at about 2:20pm, under item number I 22732-84.

Start Time $:40pm.

Q. Denotes questions asked by Det. Donald Saucier

A. Denotes answers given by Isaac Smallwood.

Q. Would you state your full name and date of birth.

A. Isaac Smallwood, 12-24-49.

Q. Mr. Smallwood where are you employed?

A. Norco Construction Co.

Q. Where [sic] you working for Norco Construction Co. on 9-20-84, at about 2:20 pm?

A. Yea.

Q. Where were you working on the above date and time?

A. In the 5300 Blk. of Chef Hwy. in the parking lot of the Schwegmann Grocery Store.

Q. Were you at that location when an unk. white female was shot and killed?

A. Yes.

Q. Would you tell me in your own words what you saw?

A. I was standing near the old gas pumps in the parking lot with my back facing the Chef Hwy. and facing Old Gentilly Rd. I heard a lound [sic] pop. When I looked around I saw a lady laying on the ground, and there was a red car coming toward me. The car then turned right on Chef Hwy, and he stopped for the red light, then he started to make a right turn but there was cars backed up so he backed up and went over the bridge. Then I walked toward the lady with the other guys and we saw she was shot in the head. Then one of the guys went to the store to het [sic] somebody and then we waited for the police.

Q. Can you describe the subject that was driving the red car?

A. He was a black man, he was about 17 or 18, He was dark complexted [sic], He had a light moustache, and braided hair. The braids looked like they went to his shoulders.

Q. Do you know what type vehicle it was that he was driving?

A. It was a red thunder bird. Maybe about a 78 or 79.

Q. When you first heard the shot, and looked toward the lady on the ground, was the black male standing near her?

A. No. He was already in the car and coming toward me.

Q. How close did was the car when it passed you?

A. About fifteen feet.

Q. Do you think you would be able to identify the subject that was driving the car if you were to see him again?

A. Yea.

Q. Did you at anytime see a weapon?

A. No.

Q. Have you ever seen the black male that was driving the car, before today?

A. No.

Q. When the subject driving the car drove out of the parking lot, which direction was he heading.

A. In the direction of the industral [sic] canal.

Q. Is there anything you wish to add or delete from this statement?

A. No.

Q. Is this statement true and correct to the best of your knowledge?

A. Yea.

This statement qas [sic] typed in the Homicide Officer By Det.Saucier and witnessed by Det.Ray Miller.

Time Finished 5:20 pm

/s/ Isaac Smallwood
Isaac Smallwood 9-20-84

NEW ORLEANS POLICE DEPARTMENT
CRIMINAL INVESTIGATION BUREAU
HOMICIDE DIVISION
FRIDAY, SEPTEMBER 21, 1984
ITEM # I-22732-84

Statement of Robert J. Territo, white male, D.O.B. 12/03/65, residing 508 Yetta st, Harvey, La, relative to his knowledge of the fatal shooting of Dolores M. Dye, white female, age 60yrs, formerly residing 5157 Wildair st, which occured in the 5300 block of Old. Gentilly Rd, at approximately 2:20PM. Thurdsay, [sic] September 20, 1984.

---------- S.T.A.T.E.M.E.N.T. START TIME 11:30AM

Q- Denotes questions asked by Detective John Dillmann.

A- Denotes answers by Robert Territo.

Q- Bobby, for the record, please state your social security number, telephone number, and place of employment.

A- My social security number is 434-86-7172 and my telephone number 361-5371. I work for Naegele Company and the telephone number 246-0500.

Q- At approximately 2:20PM yesterday an elderly white female was shot and killed in Schwegmann's parking lot, located in the 5300 block of Old. Gentilly Rd. Did you witness this fatal shooting?

A- Yes I did.

Q- Would you please explain to me in your own words, exactly what you observed and the circumstances leding [sic] to the fatal shooting?

A- I was driving the company truck and I was heading on Chef Mentuer Highway, towards Dowman Rd. I was stopped for the Red light at France Rd. when I heard a woman scream. I looked over into Schwegmann's parking lot and I saw an older white lady running from her car. It was a Red car and she ran from the drivers side to the back of the car. When she stopped and turned around, I saw that there was a black guy running behind her. She stopped in back of the car and the black guy tryed [sic] to pull her purse away. She didn't let go of the purse and the black guy put a gun to her head. Then he shot her. After he shot her, he went back to the Red car and got inside. Then he pulled out of the parking lot, onto Chef Mentuer, and he pulled right behind me. I looked at him in my rear view mirror and then the light turned Green. Then he pulled around me and I got the license number of the car. I wrote it down on a piece of paper and I got sick. Then I drove back to work and I told my friend what I saw. I was nervious [sic] to call, so my friend called the police. He gave them the license number of the car.

Q- Bobby, how far were you from the victim and her car, when the shooting occured?

A- I was on Chef Highway and they were in the parking lot. I would say that they were about thirty yards from me.

Q- What first made you look in the direction of the victim and her vehicle?

A- I heard her scream.

Q- Then you were close enough to hear the scream?

A- Yes I was.

Q- At what point did you first see the perpetrator?

A- I first saw her running and when she stopped behind the car, I saw the black guy.

Q- You stated that this subject attempted to take the victim's purse. Is this correct?

A- When she stopped, he grabbed her purse. Then she resisted him and he was holding on to the purse when he shot her.

Q- Can you furnish me with a discription [sic] of the purse?

A- All I know is that it had a strap.

Q- Did you actually see this subject shoot the victim?

A- Yes, he put the pistol right to her head and pulled the trigger.

Q- After he fatally shot the victim, what did this subject do?

A- He took her purse and he jogged back to her car. Then he got into the car and he pulled in back of me.

Q- How many shots did this subject fire?

A- One.

Q- Can you furnish me with a discription [sic] of the handgun, the perpetrator was armed with?

A- All I know is that it fit in the palm of his hand.

Q- When this subject pulled in back of you and subsequently around you, did you get a good look at him?

A- Yes I did.

Q- Can you furnish me with a discription [sic] of this subject?

A- He was a black male, about twenty-eight years old, close to six feet tall, slim build, dark skinned. His hair was wooly [sic] and in platts. He was wearing blue jeans and a plaided shirt.

Q- Would you be able to identify this subject, if you saw him again?

A- I think I can. I got a good look at him.

Q- Can you furnish me with a discription [sic] of the vehicle he was was driving?

A- It was a 1976 or 1977 Ford. I think that it was a Thunderbird or a Couger. It was Red and the license number was 607B944.

Q- In what direction did this subject flee?

A- He took a right on France Rd. Thats [sic] the last I saw him.

Q- Is this statement true and correct, to the best of your knowledge?

A- Yes it is.

Q- Is there anything you wish to add or delete from this statement?

A- No.

X
X
X
X
X
X
X /s/ Robert Territo, Jr.
ROBERT TERRITO

This statement was obtained by Detective John Dillmann, on Friday, September 21, 1984, while in the homicide office. It was completed at approximately 12:10PM and witnessed by Detective John Miller.

New Orleans Police Department
Criminal Investigation Bureau
Homicide Unit
Thursday, September 20, 1984
Item # I-22732-84

The following statement is that of Henry Williams, negro male, age 49, residing at 1524 France St., New Orleans, La., concerning his knowledge relative to the fatal shooting of an unknown, white female, which occured on Thursday, Sept. 20, 1984, at about 2:20 P.M. at 5300 Old Gentilly Rd. (Schwegmann's).

**********STATEMENT**********

Time Started:

Q. Denotes questions asked by Detective John C. Miller.

A. Denotes answers by Henry Williams.

Q. For the record, would you please state your full name, date of birth, home address and telephone number?

A. Henry Lee Williams, 10-01-34, 1524 France St., New Orleans, my home phone number is 9490387.

Q. What is your social security number?

A. 435-48-4937

Q. Where are you employed?

A. Norco Construction Co., were located on Poydras St. in the Public Service Bldg.

Q. How long have you been employed there?

A. Eight years total.

Q. How long have you lived at the above address?

A. eleven years.

Q. In your own words, would you please relate what you saw today, while in the parking lot of 5300 Old Gentilly Rd. (Schwegmann's)?

A. I was working the flagg [sic] directing traffic. I was standing around looking at the Schweggmann's [sic] parking lot and I saw the lady put her grocery's in her trunk. That's when I saw the colorded [sic] boy on the side of the car and the lady shut the trunk and the boy grabbed her and she broke loose from him. She tried to run around the other side of the car and he caught her. He held her arm with one arm and then he pulled a gun out and she screamed and then he shot her one time in the head. Then he took the keys out of her hand and got in the car and took off. He drove out to Chef and made a right turn on Chef and then drove to the corner and made another right turn on France Rd.

Q. Could you describe the colorded [sic] boy who shot the lady?

A. He's a black male, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 lbs., medium build, dark complexion, his hair looked like it was platted, it was short.

Q. What kind of clothing was he wearing?

A. Jeans, looked like a pull over shirt, old, possibly with black designs, short sleeve.

Q. Could you describe the weapon he used?

A. It was a small caliber, .22 or a .32, dark metal, revolver.

Q. If you saw this colorded [sic] boy, do you think you would regconize [sic] him?

A. I beleive [sic] I could.

Q. Would you describe the vehicle that the boy drove off in?

A. It looked like a 1979, Red ThunderBird [sic], two door.

Q. How was the lighting condition?

A. It was good, it was daylight.

Q. Do you have any hearing difficulty?

A. No.

Q. Do you have a sight problem?

A. No, I use reading glasses, but I see good.

Q. Is their [sic] anything you wish to add or delete from this statement?

A. No. But, it is the saddess [sic] deal I ever seen.

Q. Is this statement true and correct to the best of your knowledge?

A. Yes.

Q. Have you given this statement of your own free will?

A. Yes, sure did.

XXXXXXX /s/ Henry L. Williams 9/20/84
Henry L. Williams

This statement was type [sic]in the homicide office by Det. JOhn [sic] C. Miller and witnessed by Det. Ray Miller, completed at 5:10 P.M.

NEW ORLEANS POLICE DEPARTMENT
CRIMINAL INVESTIGATION BUREAU
HOMICIDE DIVISION
THURSDAY, SEPTEMBER 20, 1984
ITEM # I-22732-84

Statement of Willie W. Jones, black male, D.O.B. 12/31/38, residing 4177 W. Loyola Ave, Kenner, La, relative to his knowledge of the fatal shooting of an unknown white female, which occured in the parking lot of Schwegmann Bros. Super Market, 5300 Old Gentilly Rd, at approximately 2:20 PM, Thursday, September 20, 1984.

----------S.T.A.T.E.M.E.N.T----------

start time, 4:30PM

Q- Denotes questions asked by Det. John Dillmann.

A- Dentoes [sic] answers by Willie Jones.

Q- Mr. Jones, what is your social security number, telephone number, and place of employment?

A- My social security number is 425-88-8096 and my phone number is 469-2704. I work for Norco Construction Company for the last twenty-three years.

Q- Were you working earlier today in the parking lot of Schwegmann Bros. Super Market, located in the 5300 block of Old Gentilly Rd?

A- Yes I was.

Q- At approximately 2:20PM this date, an elderly white female was shot and killed in this parking lot. Did you witness this incident?

A- Right.

Q- Would you please explain to me in your own words exactly what you witnessed and the circumstances leding [sic] to the fatal shooting?

A- I was working in the hole and then I got out. When I got out I saw this white lady and she was walking with two grocery bags in her arms. Then I walked over to my podner [sic] and we was talking. Then I saw the lady open her trunk and she put the groceries in the trunk. She had a purse and she put it in the trunk too. Then she closed the trunk and there was this black dude by her trunk. He grabbed at her car keys and she ran to the passenger side of the car. The guy ran behind her and he was skuffling [sic] with her. He wanted her car keys. Then the lady ran back to the trunk and the dude followed her. He grabbed her arm with one hand and he reached into his pocket with the other. He came up with a pistol and when she saw the gun, she screamed. Then he put the gun against her head and he shot her. The lady fell on the ground and the dude walked around and got into her car. Then he drove off slow. He turned on Chef Highway and then he turned right on France Rd. Then he made a turn and he came back to Chef Highway. Then he turned right and went across the Seabrook bridge.

Q- Mr. Jones, exactly where in the parking lot were you working, prior to the fatal shooting?

A- By the gas pumps in the parking lot. We are laying pipe for gas lines.

Q- What type of vehicle did the victim own?

A- It was a 1976 or 1977 Thunderbird. It was maroon and it had a white interior.

Q- Where was this vehicle parked, in the parking lot?

A- She was parked right out from where we are working at.

Q- Approximately how many feet were you standing from the victim and the perpetrator, when the shooting occured?

A- About two hundred feet.

Q- Was there any other vehicles or objects, blocking your view?

A- No, I could see clear.

Q- Can you furnish me with a discription [sic] of the subject who killed this woman?

A- He was a black male, about seventeen or eighteen years old. He was about five feet-nine inches tall and weighed about one hundred and forty pounds. He was dark skinned and his hair was platted. He was wearing blue jeans and a short sleeve dark shirt. The shirt had little white dots on it.

Q- Can you furnish me with a discription [sic] of the weapon he used?

A- It was a small handgun. It was dark in color and a short barell [sic].

Q- Was this, subject attempting to steal the victim's purse?

A- She had put her purse and bags into the trunk of the car. He wanted the keys to the car.

Q- How many shots did he fire?

A- Only one.

Q- Did you see where he obtained the weapon from?

A- He was holding the lady with his left hand and he got the gun from his right front pocket. Then he put the gun to her head and fired.

Q- Was he still holding the victim when he fired the fatal shot?

A- Yes.

Q- Prior to this incident, have you ever seen this subject before?

A- No.

Q- Would you be able to reconize [sic] this subject, if you saw him again?

A- Yes I think so.

Q- Is this statement true and correct, to the best of your knowledge?

A- Yes.

Q- Is there anything you wish to add or delete from this staement?

A- No.

X
X
X
X
X
X
X /s/ W. W. Jones
Willie W. Jones

This statement was obtained by Det. John Dillmann on Thurdsay, [sic] September 20, 1984, while in the homicide office. It was completed at approximately 5:30PM and witnessed by Det. Fred Dantagnan.....

New Orleans Police Department
Criminal Investigations Bureau
Homicide Unit
Thursday September 20, 1984
Item Number I-22732-84

The following is the statement of one Lionel Elliott Plick NM, DOB. 8-14-22, residing 3826 Gibson St. Apt. A, relative to his knowledge of the fatal shooting of an unidentified white female, which occured in the parking lot of Schwegmann's Giant Supermarket, located 5300 Old Gentilly Rd. This homicide occured on Thursday September 20, 1984 at about 2:20 PM.

STATEMENT

Start time: 4:50 PM.

Q. Denotes questions asked by Det. Fred Dantagnan.

A. Denotes answers given by Lionel E. Plick.

Q. For the record would you please state your name, age, and residence address?

A. My name is Lionel E. Plick, I'm 62 yrs. old, and I live at 3826 Gibson St. Apt. A.

Q. What is your social security number?

A. 438-20-3916.

Q. By whom are you employed?

A. Right now I'm unemployed at the moment, I receive a Social Security Supplemental check once a month.

Q. Did you have the occasion to be in the 5300 Blk. of Chef Mentuer Hwy. this afternoon at about 2:20 PM. near the parking lot of Schwegmann's Supermarket?

A. Yes, I was sitting under the shed of the old gas pumps, near the Broad bus stop.

Q. While you were waiting for the bus did you witness anything unusual occur in the area?

A. Yes, I witnessed the shooting of a white lady, in the parking lot near a red car.

Q. Can you tell me in your own words exactlly [sic] what you heard and saw concerning the shooting of the white female?

A. I was waiting for the bus, when I heard a scream, it sounded like a woman screaming and when I looked over to where the scream was from I saw this white lady, and this choc-olate [sic] colored black man, and they were struggleing [sic] over something I could not make out what it was. The lady was standing near a red colored car, and all of a sudden this black guy just pointed a gun to the ladies head and shot her. The lady then fell to the ground, and the black male jumped into the red car and drove out of the parking lot toChef [sic] Hwy. towards the Industrial Canal. I did not see where he drove to because I ran to the store and told the security guard in the store that the lady had been shot. Then I went back outside and waited for the police to arrive.

Q. Can you describe for me the black male you saw struggle with the white female?

A. He looked to be about in his 20's, he was about 5'10" tall, slender build, I remember that he had on a dark shirt.

Q. Can you describe for me the white female who was shot to death?

A. A lot or people was saying she was a old lady, but she looked to me to be fairly young, she had a heavy head of hair, she was wearing slacks and a blouse.

Q. You have previously stated in your statement that the negro male shot the white female, did you see the pistol that he used to shoot the female?

A. The only thing I can tell you is that it was a small gun, and I am sure that he just put the gun to the ladies temple and shot her dead.

Q. Can you describe for me the red car that the the [sic] negro male made good his escape in?

A. It was awell [sic] kept car, it was solid red, I tried to get the license plate number but he was driving too fast.

Q. Did you get a good look at the face of the black male who shot the white female?

A. No, I did Not.

Q. In the event you see this person's photograph do you think you can identify him?

A. I do not really know if I can identify him?

Q. If you saw this same person in the flesh do you think you could identify him?

A. I think I would have a better chance to identify him in person that by a photograph.

Q. After the negro male shot the lady, before he ran to the car and drove off, did you see anything in either of his hands?

A. No, I did not notice because I was so nervous.

Q. Did you see the white female who was shot to death armed with any type of weapon?

A. No, I did not.

Q. Is this statement true and correct to the best of your knowledge?

A. Yes, it is.

Q. Is there anything you wish to add or delete from your statement?

A. No, I have told you everything I know.

/s/ Lionel E. Plick
Lionel E. Plick

This statement was typed in the
Homicide Office by Det. Fred Dantagnan,
witnessed by Det. John Dillmann, and was
completed at 5:35 PM. 9-20-84. . . .

New Orleans Police Department
Criminal Investigation Bureau
Homicide Unit
Thursday September 20, 1984
Item # I-22732-84

This is the statement of Edward Williams n/m 10-4-67 residing at 7611 Chef Menteur Highway apartment B5 relative to his knowledge of the murder of an unknown white female approximatwly [sic] 60 years of age which occured on Thursday September 20, 1984 at approximately 2:20 PM in the parking lot of the Schwegmann's Supermarket located at 5300 Old Gentilly. The perpetrator of this offense is unidentified at the time of the taking of this statement.

STATEMENT

Time Begun: 4:28 PM

Q. Denotes questions asked by Det. Ray Miller.

A. Denotes answers given by Edward Williams.

Q. State you name, date of birth and where you presently reside?

A. Edward Williams, 10-4-67, 7611 Chef apartment B5.

Q. Are you employed or go to school?

A. School at Abramson Senior High.

Q. What grade are you in?

A. Eleventh.

Q. Do you have anything wrong with your eyesight?

A. No.

Q. Is there anything wrong with your earsOr [sic] your hearing?

A. No.

Q. Were you near the Schwegmann's located at 5300 Old Gentilly on Thursday September 20, 1984 at about 2:20 PM?

A. Yes.

Q. Why were you in the area?

A. I was making groceries or my mother.

Q. While near the grocery store did you hear anything and see anything occur in the parking lot of the store?

A. I heard it when she screamed.

Q. When you say "she screamed", to whom are you refering [sic]?

A. The victim.

Q. Where were you when you heard the victim scream?

A. Standing by the bus stop on Chef.

Q. Will you now relate to me exactly what you heard and saw?

A. I was standing by the bus stop waiting for the bus and I heard a lady scream. I looked toward the

scream and I saw a lady struggling with a black male. I think that they was struggling over a pocket book. The man was holding the lady's hand struggling for what ever she had and she refused to let it go. The man raised a gun straight up and put it to the lady's head. Then he fired one shot and the lady went down to the ground. The man then took the lady's keys and then he got in the car and started it up and drove off.

Q. Did you see where the perpetrator drove to with the car?

A. He drove onto Chef. I didn;t [sic] see where he went after that.

Q. Was the perpetrator headed towards Downman Road or towards Louisa Street?

A. Going towards across the bridge.

Q. Did you get a good look at the perpetrator?

A. No.

Q. Can you provide me with any description of the subject?

A. Black, brownish eyes, dark skin, black hair. He had on blue jeans and a black shirt.

Q. Can you describe the gun th at [sic] the perpetrator used?

A. I think it was a .38.

Q. Was the gun blue steel or chrome in color?

A. Dark black.

Q. About how long of a barrel did the gun have?

A. It was small like Det. Miller's gun which is a 2" barrel. (NOTE: Det. Miller showed his gun to the witness for the purpose of attempting to narrow down the size of the gun).

Q. If you saw the perpetrator or a photograph of the perpetrator would you be able to identify him as the person you saw shoot the victim?

A. Possibly.

Q. About how far away from the shooting scene were you when it occured?

A. About firty [sic] feet. (NOTE: This distance was obtained by the subject pointing out two points in the Homicide Office. The distance was then estimated by Det. Miller and agreed to by the witness).

Q. Can you describe the car or [sic] me that the perpetrator fled in from the scene?

A. A maroon/red. I think it was a Ford Thunderbird.

Q. As far as you know ahve [sic] you ever seen the perpetrator before today?

A. No.

Q. Did you hear the lady or the perpetrator say anything other than the victim screaming?

A. No.

Q. In what hand did the perpetrator hold the gun?

A. I think his left hand.

Q. Did you see where the perpetrator pulled the gun from on his person?

A. No.

Q. How many shots did you hear fired?

A. One.

Q. Is there anything you wish to add or delete from this statement?

A. No.

Q. Is this statement true and correct to the best of you knowledge?

A. Yes.

/s/ Edward Williams Setemeer
[sic] 20 1984
EDWARD WILLIAMS

This statement was typed in the Homicide Office by Det. Ray Miller and it was completed at 5:01 PM.

RMJ
9/20/84

New Orleans Police Department
Criminal Investigations Bureau
Homicide Unit
Sunday, September 23, 1983
Item # I-22732-84

The following is a statement of Joseph Banks, negro male, age 21, residing at 2862 N. Dorgenois St., New Orleans, La., concerning his knowledge of the fatal shooting of Mrs. Dolores Dye, wife, female, age 60, formally residing at 5157 Wildair Dr., New Orleans, La.; which occured on Thursday, September 20, 1984 at about 2:20 P.M., at 5300 Old Gentilly Road – Schwegmann Super Market.

STATEMENT

TimeStarted: 12:55 A.M.

Q. Denotes questions asked by Detective JOhn [sic] C. Miller.

A. Denotes answers by Joseph Banks.

Q. For the record, would you please state your full name, date of birth, social security number and home address?

A. Joseph Banks, d.o.b. 2-26-61, I don't know it, I live at 2826 N. Dorgenois St. apt. #4.

Q. What is your home telephone number?

A. 947-1201.

Q. Are you employed, if so where?

A. I working at a self employed job, laying brick and cement.

Q. Can you read and write the english language?

A. Yes a little.

Q. What was the last grade you attended in school?

A. eight.

Q. In your own words, would you please relate, your personnal [sic] knowledge of the circumstances surrounding the death of Mrs. Dolores Dye?

A. Well I don't really know about that.

Q. Can you tell me why did you call the New Orleans Police Detective Bureau on Saturday, September 22, 1984, a about 6:00 P.M.?

A. Because my brother-in-law told that the car I bought from this dude was stolen and involved in a murder. He said it was on T.V. and in the paper.

Q. What kind of car are you talking about?

A. Ford, LTD, two (2) door, red, missing one (1) hub cap.

Q. What is your brother-in-laws' name?

A. Ronald Craig.

Q. Where does he live?

A. I don't know the street, I just know where it's at.

Q. Do you know his phone number?

A. He don't have a phone.

Q. Who did you buy the car from?

A. Curtis.

Q. Do you know Curtis' full name?

A. No.

Q. How long have you known Curtis?

A. About eight (8) years, maybe a little more.

Q. Do you know where Curtis lives?

A. On Desire Street.

Q. How much did you pay for the car?

A. Four hundred dollars ($400.00).

Q. When did you buy the car?

A. Friday.

Q. Would you pleaserelate [sic] the circumstances surrounding the purchase of the car?

A. Curtis had called his brother-in-law, Claude Burns, they call him John. I took a ride with Claude over to Curtis' house over on Desire St. We went inside and Calude [sic] went in the back of the house and talk to Curtis' old lady-Pinkie. Then he came and we took another ride to Mazant St. That's where Curtis was with car. We drove over to Mazant St. to meet Curtis with the car. He was standing next to the car, he asked me if I wanted to buy it and he gave me the keys. See, I was suppose to buy his car, but he said that he wanted to sell the ford because he was going to give it to his old lady, but he got mad at her and wanted to sell it. I was going to give him the four hundred dollars for his car but I like the ford better so he sold me that one. He asked me to help

him unload the ford, because he had grocery's in Schwegmann bags in the trunk and on the back seat. We took the spare tire out and the jack and put it in his car. After we took every thing out he took a brown purse out of the ford, from the front seat. He said that it was his old lady's purse. Then I got in the ford and I drove over back to his house on Desire St., he rode with some friend of his to his house and we met on Desire by his house. That's when I helped him unload his car and bring the grocery's inside his house. Then he asked me if I wanted to buy the little pody [sic] thing for the baby, you know. Then he changed his mind and said, he was going to keep it for his own baby. After that I just left.

Q. Did Curtis give you the titles for the ford?

A. No, he was supposed to bring them to me.

Q. Did you know the name of Curtis' friend that was with him when he sold you the car?

A. The only thing I know is that they were calling him Ricky.

Q. Do you know where Ricky lives?

A. No, I never saw him before.

Q. What was Curtis wearing when he sold you the car?

A. He had his hair combed out and a hat on his head, I don't really recall what he was wearing, but he had a white towel around his neck.

Q. Does Curtis have any gold teeth or tatoos [sic]?

A. I don't think he has no gold; now about tatoos [sic] I known he has them.

Q. Did you see Curtis again Friday?

A. Yes. at about nine (9) o'clock at night.

Q Where and what did you do?

A. He called his brother-in-law, that's where I stay and I went for the ride. We went toCurtis [sic]' house and picked him up and went back to Schwegmann on Old Gentilly.

Q. For what purpose did you go to Schwegmann's?

A. To pick up his car, because he said that it didn'y [sic] want to start.

Q. Where was it parked?

A. It was in the Schwegmann's parking lot the one by Chef next to a building. Yea, he picked up a pocket book he had by the building, it was a big brown pocket book.

Q. Does Curtis own any guns?

A. Yea, he has a .38, .32 cal. and a shotgun.

Q. Does he carry these weapons with him?

A. He carries the two pistols with him all the time. Now, If he gets out of the car he leaves the .38 and takes the .32 with him.

Q. Can you describe the guns for me?

A. Both pistols are snub nose dark metal, black.

Q. What about the shotgun?

A. He keeps that inside his house in the hallway cabnet [sic].

Q. Did you meet with Homicide Detective on Saturday, September 22, 1984, at about 10:45 P.M. to surrender the 1977, Ford, LTD II; at the intersection of N. Robertson and Franklin?

A. Right.

Q. Was that same vehicle bearing Louisiana license number 68 E 754?

A. Yea.

Q. Where did you park said vehicle in order to surrender it to the detectives?

A. In the parking lot at N. Villiere and Franklin, by Gib's Place.

Q. Did you on this same night direct two homicide detectives to the parking lot of Schwegmann's, located at 5300 Old Gentilly Road, for the purpose of showing them where you took Curtis to pick up his car on Friday, Sept. 21, 1984, at about 9:30 P.M.?

A. Yes.

Q. Did you also, laterdirect [sic] the same two detectives to 2313 Desire St. and point out the residence of Curtis, who you describe as the person you bought the Ford LTD from?

A. Yes.

Q. Early I showed you six (6) color photographs of six (6) black males, did you regconize [sic] anyone and

sign your name and date to the back of said photos as the person you refer to as Curtis; the person you described as selling the Ford LTD to you?

A. Yes.

Q. Is their anything you wish to add or delete from this statement?

A. That's it.

Q. Is this statement true and correct to the best of your knowledge?

A. Yes.

Q. Have you been promised anything for the giving of this statement?

A. No.

Q. Have you been threaten and or beaten in any way to give this statement?

A. No.

Q. Did you in fact, give this statement of your own free will?

A. Yes.

/s/ Joseph Banks 9, 23, 84
Joseph Banks 9-23-84

The above statement was typed by Detective John C. Miller, while in the homicide office of the New Orleans Police Dept.; it was completed at 2:25 A.M. Sun. 9-23-84; and witnessed by Sgt. James Eaton.

CONVERSATION BETWEEN DETECTIVE JOHN C. MILLER AND INFORMANT JOSEPH WALLACE ALSO KNOWN AS BEANNIE

BEANNIE: Who for the car(??)

Supposed to be bringing me some papers. Got to get the papers changed in my name that's what he is supposed to be doin. He didn't get em to me yet.

DET. MILLER: What's his name?

BEANNIE: His name's Curtis. See his mother-in-law, I stay with his mother-in-law, right?

DET. MILLER: Okay.

BEANNIE: Cause I'm his brother-in-law's partner. And by him taking me in, I don't know why he's so _____.

I went with him yesterday though in the parking lot at Schwegmann's.

DET. MILLER: Yeah.

BEANNIE: The parking lot. To go and get his car about 9 o'clock last night because he had left his car _____ to the store.

DET. MILLER: Okay. I saw the car down there in the other lot on the corner. That's it? How long you been knowin Curtis?

BEANNIE: For a long time. For a long time.

DET. MILLER: Joe, is that your right name?

BEANNIE: Uh-huh.

DET. MILLER: Okay. When did you get the car?

BEANNIE: Yesterday.

DET. MILLER: When?

BEANNIE: Yesterday.

DET. MILLER: Yesterday at what time?

BEANNIE: I got the car from . . . about 6:00 o'clock.

DET. MILLER: 6?

BEANNIE: Alright, let me sit down right here.

DET. MILLER: You can sit down on the steps. Tell me how it happened. What you know

BEANNIE: How he called me and all this.

DET. MILLER: Ya, how did this whole thing come about. Let's sit down.

DET. MILLER: Well about 6 o'clock. He _____ and he came to me with the car and [I] paid $400.00 for the car.

DET. MILLER: Uh-huh.

BEANNIE: He just gave me the keys and that was it. He told me he was going to bring me the papers and so around 9:00, he called us up and told to ask my partner come pick him up, go and get his car out of Schwegmanns parking lot and then I seen them on the news, you know.

DET. MILLER: Okay, wait now. Curtis had his car in the Schwegmann's parking lot? What kind of car is that?

BEANNIE: It's a Ford, four-door.

DET. MILLER: Do you know what kind of Ford?

BEANNIE: Orange.

DET. MILLER: But you didn't know, you didn't say anything about the car where he got it from or how come he was selling it so cheap?

BEANNIE: No.

DET. MILLER: You didn't ask?

BEANNIE: Uh, uh.

DET. MILLER: How did you find out about the car?

BEANNIE: He called us up. He called us up. He needed a ride mostly, you know.

DET. MILLER: Yeah.

BEANNIE: He made it, he made it so a _____ with the car.

DET. MILLER: Uh, huh.

BEANNIE: You know. And that's what he brought at to go and get the car.

DET. MILLER: Okay. So you met him yesterday, what was that Friday about

BEANNIE: About 6:00 o'clock in the evening.

DET. MILLER: Where at?

BEANNIE: We met him over here on a – where the car was parked on a – _____. I used to go to the store too. All the time on that street.

DET. MILLER: Which street?

BEANNIE: On uh uh about two blocks on Desire Street _____.

DET. MILLER: Camp?

BEANNIE: Where Desire bus run at like when it going back to Canal Street?

DET. MILLER: Yeah. _____. Yeah, I think I know where, I'm not real familiar with that area. But it's right on the like [sic] where around Desire and Law?

BEANNIE: Where the bus go back to Canal Street.

DET. MILLER: Okay.

BEANNIE: On that street.

DET. MILLER: Well what do you do, he just had it parked there?

BEANNIE: He had it parked right there and that's all. Just to call me up

DET. MILLER: So, that's where you had to go pick up your car?

BEANNIE: He was there, though, with the car.

DET. MILLER: He had the keys to it?

BEANNIE: Uh huh.

DET. MILLER: Was he in it? Was he driving it or was it just there?

BEANNIE: He was driving the car. He parked the car and then picked it up there.

DET. MILLER: Okay. And then what happened there?

BEANNIE: Oh, he told me, you know, this was his car and he just wanted his to sell it because he had another one he had supposed to bought it for a lady and she pissed him off so he was selling it.

DET. MILLER: Okay. How long you been knowing Curtis?

BEANNIE: For years and years.

DET. MILLER: How many years and years?

BEANNIE: I've been knowing him since I was hanging with his partner. I was about eight years old then.

DET. MILLER: You don't know his last name man all them years.

BEANNIE: I never did know his last name.

DET. MILLER: Where does he live at?

BEANNIE: On Desire Street. I know where stays exactly, but I don't know his address.

DET. MILLER: Well, what does Curtis look like.

BEANNIE: He slim dude with a bush.

DET. MILLER: I'm going to stand up, my behind's all wet.

BEANNIE: Slim dude, he had a bush. And he's dark, real dark.

DET. MILLER: Let me ask you. Did – about how old is he?

BEANNIE: Curtis would be about 25.

DET. MILLER: How old?

BEANNIE: He'll be about 25, 24.

DET. MILLER: Has he ever been arrested before?

BEANNIE: Ya.

DET. MILLER: Wait a minute. Let this dude go by us. So –

BEANNIE: I'm in the wrong spot man.

DET. MILLER: We can – we're alright here. People think we live here or something man.

BEANNIE: Man _____.

DET. MILLER: _____. Do I look like police?

BEANNIE: No. _____

DET. MILLER: Okay – Bullshit. Listen. So what kind of

BEANNIE: Think you can get me something to put on me where you can hear em talk.

DET. MILLER: Ya.

BEANNIE: _____.

DET. MILLER: You would do that?

BEANNIE: Ya, fucking right. Because he owes me $400 and I can't just get it back and if I sit on him too much, I mean, you all go pick him up _____ cause he doesn't know I told you. I what something similar where they won't know.

DET. MILLER: Yeah.

BEANNIE: Because they'll put me out and I ain't got a place to stay.

DET. MILLER: Yeah. Okay. I want to know more about Curtis. Like where's he stay at?

BEANNIE: That's all I know is on Desire Street.

DET. MILLER: On Desire. Is it in the projects, near the projects.

BEANNIE: It's on the street.

DET. MILLER: You can show me where it's at?

BEANNIE: Um-hum.

DET. MILLER: Joe what's your full name? What's your real name. Is it Joe?

BEANNIE: Uh, huh.

DET. MILLER: What do they call you?

BEANNIE: Beannie.

DET. MILLER: What?

BEANNIE: Beannie.

DET. MILLER: Beannie? Like a beannie. What

BEANNIE: Beannie.

DET. MILLER: Beannie. Okay. What do you what [sic] me to call you? Beannie?

BEANNIE: Uh huh.

DET. MILLER: Beannie. Beannie's good. Okay.

BEANNIE: I betcha I, boy I betcha I can get in a lot of trouble with this shit, uh?

DET. MILLER: Does he carry – no, you can't but we know other people can though. You did the right thing. You know, calling us as soon as find out. What a – what a – does he carry anything?

BEANNIE: Oh, shit yeah.

DET. MILLER: What's he carry?

BEANNIE: He got two pistols man.

DET. MILLER: How many?

BEANNIE: Two.

DET. MILLER: He carries two all the time.

BEANNIE: Uh, huh. Your talkin about a bad mother fucker man. Me and him got into it one day, he tried to shoot me.

DET. MILLER: What kind of pistols he got?

BEANNIE: He got a 38 and he got a 32.

DET. MILLER: A what?

BEANNIE: A 38 and a 32 and he got some other kind of small

DET. MILLER: What do they look like?

BEANNIE: Black. Both are black.

DET. MILLER: Is that automatics or revolvers.

BEANNIE: Revolvers.

DET. MILLER: Where's he keep em at.

BEANNIE: He keeps one on him at all times. See that's why I say if you can set him up good, you can get that same gun.

DET. MILLER: You'd help me?

BEANNIE: Fucking right if you'd get my money back.

DET. MILLER: I don't know how we can do that but he didn't say nothing about that robbery or nothin. Huh?

BEANNIE: I knows. I know it. I know it.

DET. MILLER: How do you know?

BEANNIE: I know it. I picked up on it when I seen the news and I seen it in the parking lot, and the car was right there.

DET. MILLER: Did you look in the trunk already.

BEANNIE: Yeah, they ain't got shit in there.

DET. MILLER: They ain't got nothing in it? Nothin inside the car?

BEANNIE: And I had people in that car too man.

DET. MILLER: Your saying, you knew he was arrested. You ever know what he was arrested for? So, he was definitely sitting in the car when you got it from him.

BEANNIE: Uh, huh.

DET. MILLER: And he supposed to bring you the papers, when?

BEANNIE: He's supposed to bring them to me tomorrow. Or either I go pick them up.

DET. MILLER: Would you go take a ride with me tonight?

BEANNIE: Over by him?

DET. MILLER: Yeah.

BEANNIE: Yeah.

DET. MILLER: First let's go take a ride and just look at the car. I don't want to go fool with it. Let's just go pass it right now and go look at it. It's right there in the next block.

BEANNIE: It's right on a corner.

DET. MILLER: Okay. Come on. What's that Villarie. Yeah. You ever been arrested.

BEANNIE: Uh, huh. Fighting.

DET. MILLER: For what?

BEANNIE: Fighting.

DET. MILLER: You changed the plates on it, huh?

BEANNIE: You never know.

DET. MILLER: Yeah, that's it. You just changed the plates on it. We'll leave right. You got keys to it?

BEANNIE: Uh, huh.

DET. MILLER: You said you had to – did you have to take him to Schwegmann's to get his car?

BEANNIE: He wouldn't go get the car?

DET. MILLER: Where was his car parked at?

BEANNIE: On same side of

DET. MILLER: Let's walk. Where?

BEANNIE: On the same side where the woman was killed at.

DET. MILLER: Okay. It was parked right there?

BEANNIE: Yeah.

DET. MILLER: What kind of car does he drive?

BEANNIE: It's a Ford, it was orange. But it's a square Ford.

DET. MILLER: Square Ford?

BEANNIE: Yeah and it's _____.

DET. MILLER: Well who was there, just you and him when you went to go get his car?

BEANNIE: Me and him and my partner – his brother-in-law, his brother-in-law ain't going to – I don't know.

DET. MILLER: He wouldn't get out of –

BEANNIE: His brother-in-law. His brother-in-law ain't goin – I don't know. You know.

DET. MILLER: No, we won't involve him.

BEANNIE: They goin – then goin to know it me.

DET. MILLER: What about Curtis now. Did he get out to get the car?

BEANNIE: No, his own car?

DET. MILLER: Yeah.

BEANNIE: No, he wouldn't go get it his own car.

DET. MILLER: So who drove it?

BEANNIE: My partner drove it.

DET. MILLER: Oh

BEANNIE: He told him to go get it. But he didn't want tell him why.

DET. MILLER: Uh, huh.

BEANNIE: See, I told my partner

DET. MILLER: Well, we'll definitely keep this between us. So, I would like to take a ride tonight to go look at his place.

BEANNIE: We can go.

DET. MILLER: When are you supposed to meet him to do them papers?

BEANNIE: Tomorrow evening.

DET. MILLER: Tomorrow evening? You think you can get him to do it tonight? Go tell him you want to do because you might go out of town for a little while? Tell you to get the papers straight for you?

BEANNIE: I would be rushing it then.

DET. MILLER: Yeah.

BEANNIE: Because if he knows _____ mother fucker _____ and he try to see if he can stop me.

DET. MILLER: Yeah. Come here. I know what I want to do. I want to get the plate number on the back of that thing. It a E plate right now. 56E – Edward what?

BEANNIE: What on there?

DET. MILLER: Yeah.

BEANNIE: May your good with numbers, man.

DET. MILLER: Oh, that's my job man.

BEANNIE: Man, I cannot remember all that.

DET. MILLER: Let's go get it.

BEANNIE: If it was Johnnie I would let him know I was coming to meet you.

DET. MILLER: Yeah, that's it. Any of you all got the time?

Yeah, 10 after 11.

DET. MILLER: Thank you. Oh, 68 E- Edward 754. 68E- Edward 754. Okay.

BEANNIE: Uh, huh.

DET. MILLER: So, where does he carry his guns at. Where does he carry the guns at?

BEANNIE: Should be in his car, in his car with him.

DET. MILLER: Uh, huh.

BEANNIE: But he got one inside. It seems like when he went in there in his house last night.

DET. MILLER: Does he live with anybody?

BEANNIE: Ya.

DET. MILLER: Who does he live with.

BEANNIE: he lives with my p_____'s sister.

DET. MILLER: Okay.

BEANNIE: They got lil' children in there. Four of them. Then they got 2 extra children in there.

DET. MILLER: Yeah.

BEANNIE: They got six children in there.

DET. MILLER: Does he work anywhere?

BEANNIE: I mean, he don't work.

DET. MILLER: Let's just walk. Well, let me ask you something. Would you be willing to go to my office

and give me a typewritten statement. You know, put it all on paper.

BEANNIE: Am I going to get put in jail?

DET. MILLER: No, no way. You didn't do anything wrong. You found out the car was stolen and it was involved in this thing here. You called the police and here we are, we meet. You write it all down to me. You haven't done anything wrong. You know.

BEANNIE: Uh, huh.

DET. MILLER: You didn't know it was stolen when you bought it.

BEANNIE: Nobody goin to know I know. You know. Nobody goin to know I was telling you this. I want you to hear it for yourself.

DET. MILLER: Yeah. That's what I would like to do, too. We have to –

BEANNIE: You can't rush it.

DET. MILLER: No, I know. I have to discuss with my supervisor, my boss yeah, I have to talk to my boss first you know. We got to talk to my boss and see how were going to work this out. I don't want to put you in the middle, but ya know I need your help.

BEANNIE: I know.

DET. MILLER: And then, I'm goin – his fingerprints are probably be in the inside of the car and yours will too.

BEANNIE: Other people man. I had

DET. MILLER: How many people you had in your car.

BEANNIE: We went out last night man. That is what pissed me off

DET. MILLER: You know, how many people you had in there

BEANNIE: Four.

DET. MILLER: Four.

BEANNIE: My partner, and _____.

DET. MILLER: Who all you had, okay. Who all you had in your car?

BEANNIE: Oh, just me and another dude and two chicks.

DET. MILLER: What's their names, ya know so later on I'm going to have to check all the fingerprints.

BEANNIE: I don't know their last names. Yeah, but I know their first names.

DET. MILLER: Do you know anything else about Curtis, any other crimes he might be involved in?

BEANNIE: That motherfucker shit. Yeah, see people who know what fuck means. Bro. right? Ya, I know alot.

DET. MILLER: You want to help us?

BEANNIE: Yeah, let's go.

DET. MILLER: I got a car. Let's get in my car.

BEANNIE: _____. That Curtis man, he will probably kill me, brother.

DET. MILLER: _____. My boss, he's not far from here. He's going to meet us by the car.

BEANNIE: Okay.

DET. MILLER: Wait right here on the corner. He'll show up and then we'll leave with him. We'll go take a ride in his car, the police car okay. I want you to stay down and we'll go look past the house, you know, look at it. We'll talk to my boss and see what he says.

BEANNIE: Is it going to be a plain car?

DET. MILLER: Yeah, it's a plain car. Yeah, don't worry, its a plain car. Okay, come on, that's him. You ain't carrying nothin. Huh?

BEANNIE: _____, no.

DET. MILLER: Good. I don't want you getting in trouble aroud here. Where we goin at on Desire.

BEANNIE: Uh, huh.

DET. MILLER: Where at on Desire?

BEANNIE: A block from Galvez.

DET. MILLER: A block from Galvez, Okay. This is Sgt. Eaton. Joe, what's your full name.

Beannie: Joe Banks. We'll get down a little bit in the car, you hear, yeah; get down where just the top of your head.

DET. MILLER: Turn this thing off?

SGT. EATON: Yeah, I got mine on. – no leave it.

DET. MILLER: This other thing.

SGT. EATON: No.

DET. MILLER: Leave this on, okay. Just tell us where to go, Joe.

BEANNIE: Get on Desire Street.

SGT. EATON: First of all, the automobile.

BEANNIE: _____.

SGT. EATON: Alright you have the car?

DET. MILLER: Yeah.

SGT. EATON: Where is it parked at.

DET. MILLER: On Villere and – what is this? Franklin in a parking lot – there is a bar there. It's got a different plate on it.

SGT. EATON: Let's go get the plate number and let's get 3006 to get a car over there to pick it up.

BEANNIE: Okay, then –

SGT. EATON: That's why he's got it there. Some other – somebody else might a come steal it.

DET. MILLER: Yeah, but the problem is now – he will help us – he said he'll wear a wire to go talk to

what you call it to get him to say whatever he can say about the car and whatever else.

SGT. EATON: Has he told you anything about the Ford? I assume we're talking about the maroon Ford.

DET. MILLER: It's red.

What color is his car?

BEANNIE: His car?

DET. MILLER: Yeah, tell him about this car.

BEANNIE: It's green, right?

SGT. EATON: What year is it?

DET. MILLER: This is it – changed the plate.

SGT. EATON: That is the car?

DET. MILLER: Yeah, no doubt. Go ahead and describe the car to him before we get there.

BEANNIE: 3 hub caps on it, LTD Ford, two-door.

SGT. EATON: Did Curtis tell you where he got this car from?

DET. MILLER: Take a right, right here. Matter of fact – you see it. Look at it right here on the right. See it?

DET. MILLER: Take a right.

SGT. EATON: No.

DET. MILLER: You see it right here. It's the third car. There you go. It's a E plate. He changed the plate on its got an E plate on it.

SGT. EATON: Ah shit we need the damn license number.

DET. MILLER: Just go ahead you can drive right through.

SGT. EATON: Does anybody there know you?

BEANNIE: Huh?

DET. MILLER: Does anybody there know you?

BEANNIE: Na-Uh.

NOTHING BUT STATIC ON TAPE

DET. MILLER: Do you think its possible to let him keep the car, 1 night and meet the guy tomorrow, or do we have to take the car tonight?

SGT. EATON: I don't see any way. He's got to process it.

DET. MILLER: OK.

SGT. EATON: He's going to ask him where the car is at. He's gonna say Joe, do you know where the car is at?

BEANNIE: Yeah, I'm supposed to be going.

DET. MILLER: You can just tell him you left it somewhere, that it broke down or that you put it in the shop or something.

SGT. EATON: 3140 to 3006 _____ talking _____ car is going to be parked at Villere and Franklin. It's going to be on the uptown side in a lot beside the barroom. Its got an E plate on it – give it to the desk

DET. MILLER: Name of the lounge is Bob's Place. Right on the corner by the parking lot.

DISPATCHER: _____ registered to Harry Lee Robinson, 2643 Almonaster, 73 Chevy, Gold in color _____ stolen.

DET. MILLER: All right, you want to give that plate number to 3006.

3006: Just hold, I'll get it later.

DET. MILLER: Is that 26 still with us?

SGT. EATON: Yeah.

SGT. EATON: Where we going, to Galvez?

BEANNIE: Uh huh.

DET. MILLER: Is that North Derbigny we just crossed? I'm so lost over here, man that's why I gotta always

SGT. EATON: Go straight.

DET. MILLER: Go straight? Which street is this that we are on here, is this Almonaster Avenue here? Ok, just stay down.

SGT. EATON: Did Curtis tell you where he got this car?

DET. MILLER: Tell my boss everything you told me.

BEANNIE: He called me up and he told me he wanted to sell me this other car. But he bought it for his old lady . . . but he said he didn't want to give it to her.

He gave me the keys to the car. It was supposed to go like that. He was going to bring me the papers tomorrow, and after that, later on that night he called me back up after haven gotten the car and told me to come and get him and bring him back to his car out the Schwegmann's Parking lot.

SGT. EATON: What Schwegmans?

BEANNIE: In um Gentilly.

SGT. EATON: Gentilly and what?

BEANNIE: and Broad.

DET. MILLER: Where at? Be right near Gentilly and Broad. On Broad Street? OK

SGT. EATON: Which one. Now wait you are saying Gentilly, now there's two of them, there is one on Gentilly.

BEANNIE: OK, one right before you go over the canal.

SGT. EATON: Ok, I got it. The big Schwegmans then. What kind of car does he have?

BEANNIE: He's got a Ford, a big orange Ford. 4 door This morning when I went by my sisters house in the car and she had a paper and my brother had told me it was a hot car

SGT. EATON: If you help us, which you have already been a big help, believe me.

DET. MILLER: Yeah, a lot of help.

SGT. EATON: And you cooperate with us, I know you want to get it resolved. First of all, he sold you

a car you could'n [sic] use. He knew that when he sold it. He is not going to bring you the papers I guarantee it. He can't bring you the papers. But you keep going with us, stay with us and give us a hand, help us, and you're not not [sic] going to lose your $400.00., I guarantee you that.

BEANNIE: I'm not going to have to show my face or anything?

SGT. EATON: No. No, but you understand that we have to do things by law and rules and regulations, ok? We can't just say well, Curtis did it, huh and "boom" that's it. We need you to come with us.

BEANNIE: You want to make sure you know he done it. I just want to make sure he don't know me.

SGT. EATON: Yeah, we want you to come up there, we want to try to get a picture of him and we want you to identify him. Where at left? Left on Desire?

BEANNIE: Left, make a left.

SGT. EATON: I want you to identify him for us, ok give us enough cause that we can pick him up for this and we will do the rest. We can take

BEANNIE: I want to make sure he don't use his guns.

DET. MILLER: Yeah, how many guns you say he's got?

BEANNIE: Two.

SGT. EATON: I don't know, we'll have to talk about that later.

DET. MILLER: Ya know because . . . he carries two guns.

BEANNIE: The car is on this side

DET. MILLER: On the right side?

BEANNIE: Right there.

DET. MILLER: You gotta tell me the address so we can get a description.

BEANNIE: You see that car?

DET. MILLER: Yeah, that is an El Camino Ford.

BEANNIE: In front of that house.

DET. MILLER: Which color house?

BEANNIE: That big old uptown house.

SGT. EATON: This thing right here?

DET. MILLER: **This big one right here?**

SGT. EATON: **2313-2315. Which side? He lives on the side that the Ford's parked on?**

BEANNIE: **Yeah.**

SGT. EATON: **Damn Ford is back in Johnny. It's going to be 2313 or 2315 Desire.**

DET. MILLER: **Which side does he live on? That's 2313 downstairs?**

SGT. EATON: **I think it is.**

DET. MILLER: **Two story, white pillars.**

SGT. EATON: **Take one more pass by before we go back to the office.**

DET. MILLER: **Yeah. That orange car, that's the one he drives?**

BEANNIE: **The one in the yard _____.**

DET. MILLER: **It was back in and I didn't even see it.**

SGT. EATON: **Do you know anything about him? Do you know what he has been doing?**

BEANNIE: **He don't work, he hustles.**

SGT. EATON: How does he hustle?

BEANNIE: He just does.

SGT. EATON: In other words, he's been robbing people?

BEANNIE: Yeah, shit like that.

SGT. EATON: Do you know anybody in particular or anyplace in particular he's robbed? May [sic] we can identify him on that and then this comes out later? You know what I mean?

BEANNIE: Yeah, I know what you mean. Really, I don't hang with him. Me and him got into it and he tried to shoot me. He's my partner's brother-in-law.

3006: Call the crimelab and have them meet me at Villere and Franklin under that item.

DISPATCHER: ten-four.

3006: Also call a tow wagon by phone and have them meet me out here.

DISPATCHER: ten-four.

SGT. EATON: Its a two-story.

DET. MILLER: What color is that thing.

SGT. EATON: Brown, brown with white trim.

DET. MILLER: Brown with white trim. Its 2313.

SGT. EATON: 2313 Desire.

SGT. EATON: Let go back to the office and we'll see what we can get. Is there anyway you can get us a last name?

DET. MILLER: Lets go by his house, this is it here. We can run his address, and it oughta come back.

DET. MILLER: How long has he lived there?

SGT. EATON: Maybe, maybe not.

BEANNIE: He's been living there a long time.

SGT. EATON: At that address? Beautiful. If we get a picture of him, you will identify him?

BEANNIE: I ain't doing all of this for nothing, you know.

SGT. EATON: You ain't going to lose that $400.00, we'll see to that.

BEANNIE: Ya See, I had company in that car last night, you know,

DET. MILLER: He took a bunch a friends out.

BEANNIE: And that's what pissed me off, man. But because I got busted in there and like they say that a male was in his 20s, I could have been charged with that.

That's what my brother-in-law was trying tell me this morning.

DET. MILLER: Your brother-in-law was telling you right.

SGT. EATON: Oh definitely, you did the perfectly right thing.

DET. MILLER: As soon as he found out he called us thought he got in touch with us.

SGT. EATON: What, you saw it on the news?

BEANNIE: Yeah, then I seen a picture, you see I didn't know about the murder until I seen it in the paper, and I seen it on the news but I didn't know that was the car in the picture. They ain't really say nothing too much about the car at first. When I seen it in the paper today though.

SGT. EATON: Did he show you any papers to the car or anything?

BEANNIE: Huh?

SGT. EATON: Did he show you the papers to the automobile?

BEANNIE: Uh-huh, he supposed to get it to me.

SGT. EATON: He couldn't find it.

STATIC

SGT. EATON: Where did he tell you he got this automobile?

BEANNIE: That he bought it _____ and he _____

SGT. EATON: He didn't tell you who he bought it from or any of that?

SGT. EATON: Did you ask him how long he had it?

BEANNIE: No I didn't.

SGT. EATON: No. Did he tell you why he had to go pick his car up from the Schwegman's parking lot?

BEANNIE: Well he, he said that it _____.

DET. MILLER: Can we go to the Schwegman's parking lot just to verify that it is the same parking lot?

SGT. EATON: Sure, we will.

DET. MILLER: We want to make sure we are talking about the same parking lot. So lets go over there and you show us that that's it.

SGT. EATON: And where he had his car parked when you all got there to pick his car up.

DET. MILLER: Yeah.

STATIC

DET. MILLER: So glad you decided to meet us. The Secretary said you started to change your mind

BEANNIE: Who the secretary?

DET. MILLER: Yeah.

DET. MILLER: One of the smartest moves in your life.

SGT. EATON: I'm gonna let Charlie know where we are going.

SGT. EATON: 3140 to the unit _____. We are going to take a spin over by Schwegmans

DET. MILLER: I'm still on.

SGT. EATON: You saw him Friday right?

BEANNIE: Uh-huh.

SGT. EATON: How was he dressed Friday when you saw him?

BEANNIE: He had a hat on his head.

DET. MILLER: What about his hair?

BEANNIE: Bushy.

DET. MILLER: Bushy? Does he ever wear it in plaits?

BEANNIE: Uh-huh he had a bush that day with his hat on.

SGT. EATON: Friday he had his bush out, do you remember the color shirt and pants he had on?

BEANNIE: Damn, I don't know. I don't know if they were blue jeans or levi jeans. _____ Or what kind of color jeans.

SGT. EATON: Did you see him Thursday?

BEANNIE: Huh?

SGT. EATON: Did you see him the day before that, Thursday?

BEANNIE: No, huh-uh.

DET. MILLER: Do you got an ink pen?

SGT. EATON: Wait a minute. There may be one in there.

DET. MILLER: Where were you at with that car today? Yeah, today?

BEANNIE: No where _____ parked.

DET. MILLER: Parked where?

BEANNIE: No, no, I did go somewhere. I went to the French Quarter and I drove from there, and I parked there by my sister's house today.

DET. MILLER: Where does she live at?

BEANNIE: I don't know the name of the street.

DET. MILLER: Where you at 7:30 this morning with that car?

BEANNIE: 7:30 this morning I was sleeping.

DET. MILLER: OK.

SGT. EATON: Has Curtis ever told you anything? About anything else he had done, doing anybody, shooting anybody?

DET. MILLER: Any crimes?

BEANNIE: _____

DET. MILLER: Yeah but has he talked to you about any crimes that he has committed?

BEANNIE: _____ he keeps to himself, man. I was going to buy from him but he was telling me _____.

DET. MILLER: He says you have known him practically all your life practically then.

BEANNIE: Practically, man.

SGT. EATON: Apparently he doesn't confide too much in you though.

BEANNIE: No.

SGT. EATON: Since you all had a falling out.

BEANNIE: No, not after he tried to kill me.

DET. MILLER: What kind of gun did he try and kill you with?

BEANNIE: He had a huh, a .32 or 38.

DET. MILLER: How many guns does he have?

BEANNIE: He got two now that I know of maybe 357 or 8.

DET. MILLER: Do you know where he threw it at?

BEANNIE: I was going to _____ it but somebody else brought it _____

DET. MILLER: So he's got a 38 and a 32? Do you know what kind?

BEANNIE: No, just black.

DET. MILLER: Just black metal?

SGT. EATON: About how tall is Curtis, do you know?

BEANNIE: How tall is Curtis? About so high _____

SGT. EATON: About 5-5/5-6?

SGT. EATON: About my height he said.

DET. MILLER: About your height?

SGT. EATON: Right at 6 foot then.

BEANNIE: He's skinny, real skinny.

DET. MILLER: He's skinny?

SGT. EATON: What's his street name? What do they call him for short?

BEANNIE: I don't know _____ Curtis.

DET. MILLER: Curtis?

BEANNIE: If ya'll ever decide your going to get him I'm tellin you you gotta get this dude cause if you don't he gonna come after me when I'm in that car I know. He going to.

DET. MILLER: No, we ain't gonna let that happen.

SGT. EATON: No way.

BEANNIE: What I'm saying, his mother-in-law, she finds out I put her son-in-law in jail I'm out on the street.

SGT. EATON: No, that's not going to happen. First of all there was other people there. You know what I mean? I mean there is no way in the world.

DET. MILLER: We got plenty of witnesses for this thing, ok? And I'm sure once we get his picture and do a photo line-up, they will be able to identify him. When was the last time he was arrested?

BEANNIE: _____ last of last year around that time?

DET. MILLER: Last of last year? At his house? You know what the charge was?

BEANNIE: I know it _____.

DET. MILLER: What was it about.

SGT. EATON: When you see him tomorrow, if he asks about the car, just tell him somebody stole it. That's all. You know, get all indignant, ask him if he took the car back.

DET. MILLER: Yeah.

DET. MILLER: That's all, you know? He was the only one that know you had it and this and that and the other. He don't know. You know?

BEANNIE: He had a pocket book man. He had a brown pocket book.

SGT. EATON: Yeah, he had a pocket book?

BEANNIE: He had a pocket book. Go get his car _____ he had had a pocket book.

DET. MILLER: Where was that pocket book at?

BEANNIE: I'll show you man

DET. MILLER: It's still out here you think?

BEANNIE: No, huh-uh, he's got it.

DET. MILLER: Where's he got it, at home?

BEANNIE: At home. In his _____

SGT. EATON: What was in the pocket book?

BEANNIE: I don't know, he had _____ when he got it he ain't ya know. Give me nothing or whatever or give nobody else nothing _____ he just took it and throwed it in a chifferrobe, like _____

SGT. EATON: Yeah. He got it out the car, you mean?

BEANNIE: Yeah. Out the car.

SGT. EATON: Where at?

BEANNIE: _____ out the bushes.

DET. MILLER: Out the bushes?

BEANNIE: I'm gonna show ya.

DET. MILLER: Okay.

BEANNIE: Lady must have been gonna make groceries. He had a lot of groceries.

DET. MILLER: He had a lot of groceries? What? At the house?

BEANNIE: He had a baby crib, I mean a potty, like, in the car.

DET. MILLER: Yeah. That was for her grandaughter [sic].

SGT. EATON: Plus he had bags of Schwegmann groceries.

DET. MILLER: Yeah, she just had a grandbaby. Her first grandbaby. Ya saw the Schwegmann, I mean was it Schwegmann bags, or what?

BEANNIE: Yeah, it was Schwegmann bags, but that potty thing was in the white bag.

DET. MILLER: Yeah.

BEANNIE: She got that.

SGT. EATON: Part of the purse may still be under that bush. Because he got that pocketbook out from under.

SGT. EATON: Was that a purse, or just a little pocketbook.

BEANNIE: It was a like a purse . . . like a purse.

SGT. EATON: Oh, a purse?

DET. MILLER: We'll go look.

SGT. EATON: It's in his chiffarobe.

DET. MILLER: He always carries the guns with him, he says. A .32 and a .38 and he always carries them with him.

BEANNIE: _____.

SGT. EATON: This is the right Schwegmanns?

BEANNIE: Yeah, and the car was parked right there.

DET. MILLER: Now you show us. Now you tell the sergeant which way to go.

BEANNIE: The car was parked right over there.

DET. MILLER: Where?

BEANNIE: Right over there by that Pinto.

DET. MILLER: Oh, yeah?

BEANNIE: The car was parked right there and the purse was right over there in them bushes.

SGT. EATON: Right under that sign.

SGT. EATON: Was that Pinto parked there at the time, too?

BEANNIE: Nuh-uh.

DET. MILLER: You want to get out, or you want to stay in? Come on, here.

BEANNIE: _____.

DET. MILLER: Yeah, just stay in.

BEANNIE: He was parked over there, 'cause he didn't want us to come over here, you know, but he didn't tell us the reason.

DET. MILLER: Where did he walk over now?

BEANNIE: No, he didn't walk over at all.

DET. MILLER: He stayed in the car?

BEANNIE: Yeah, he said my partner's going to get this car. So he just walked over here and come get it.

DET. MILLER: Was this car facing the wall or facing out?

BEANNIE: _____ face the wall.

SGT. EATON: Where did he stoop down at the bushes at?

BEANNIE: Right there.

SGT. EATON: Right here?

BEANNIE: Yeah. _____.

SGT. EATON: Oh, I see. Yeah.

DET. MILLER: Right about here? Huh? What's that?

STATIC

SGT. EATON: He said his garbage goes out tomorrow said if he's smart he'll put it in garbage. He said but he ain't that smart.

DET. MILLER: Okay. You want to go back to the office, or _____

BEANNIE: Yeah.

SGT. EATON: Yeah, cause we gotta see if we got a picture of the cat.

DET. MILLER: Yeah. Now does he have any tatoos [sic], gold teeth, or anything?

BEANNIE: No. _____ tatoos [sic] _____. It was right here, man, _____ getting gas.

_____

Bernie

S called Johnny. little after five
Johnny - mechanic - shop - Lee St. House -

5:00 - Johnny's House
w/ mother
Bernie
Marilyn
Claude
} S called - eating

1/2 hour - Johnny told w/ ~~Ed~~ He was going to take ride to Curtis' House - Harry - don't bring Ford in car - brought plate back upstairs.

Went to S's house, Curtis & Johnny went to kitchen - Black, Pinky & Bernie stayed in front. (Children home - & Cat -)

They came from back - went to Sch. -
Bernie, Black, Curtis, Johnny - Johnny's car - Johnny driving → Curtis got out Bernie behind driver -

Arrived Sch. Parked by store - Gas pump

Black brought Curtis home for his gasoline

Johnny got in Curtis' car - Bernie asked Curtis what was wrong w/ his car - Johnny just got in & started car - Car was jumping Johnny pulled out last w car - Curtis followed -

Went to Pinky's house - Johnny parked Curtis ~~Both~~ car in driveway - Curtis pulled in sideward. All inside - Same people as before - Curtis called Johnny & Black to kitchen - asked Pinky what was up → Radio on - Black, Johnny Bernie, Curtis - went Black out - Johnny to car (Grey chevy)

To Blacks house - dark - 7:30 - 7:45
Bernie stayed in car (or) - they met the entrance - Bernie went on side to speak to Janice - she show left. - while talking to her - he was setting on Monte Carlo - 10 min. later - all three came out of groceries - 2 or 3 times + pick etc. - Curtis - patty + brown purse - + tire. Sign gas -
Went back to Curtis house - some people - Pinky came on porch - they began to unload - Pinky asked what was going on - One bag broke - Curtis asked Bernie to help pick up - picked up Dog food, Catfood groceries, etc - Brought inside - Curtis asked Bernie to get more - got patty + ~~boys~~ boy - Pinky came to kitchen - asked her what was up - She didn't know - Curtis came to kitchen - She was cooking - fed Bernie first - Curtis got made - All four fellas in front + Cat - Cat called to kitchen to ~~get~~ help ~~get~~ put up groceries → Curtis went to get purse - put purse in chiffrobe in bed room -
close to 10:00
On porch - four guys - drink → Jack Daniels Curtis gave Black $5 - took 5 back - bag of weed - Curtis went to get weed + Jack Daniels in ~~Cadi~~ Johnny's car - He came back - on porch - drinking + smoking -
Left ~~at~~ about 12:00 - Johnny + Bernie - Black still there.

Work - cement work - Nat -

Friday

11:00 Blanie + Johnny - phone rang - Johnny answered - Curtis - left for Curtis' house 11:30 arrived - Curtis pulled on side - asked if he wanted to buy car - He said he bought car for old lady - she not acting right + he wanted to sell it. Wanted $600 → told him $400 → he brought him to look at car - at Blanie - started up - got in car - pulled out hit fence - scratched on passenger side (rear) - Curtis waiting in front Gave $400 - told not back by Curtis House - He followed Blanie by Curtis' house - They never showed up - Went in to talk to Pinky - she wasn't home - Blanie was there - waited for hour - left Went to mom's house - showed her car - asked where he got car - she looked at car - Hung around for while - no one else home - Left + rolled around - ~~night - went out about 11:00 - Allen's stop - [illegible] saw Jones~~ - Went by sister's house 6:00 - Showed car to them - they asked how much - old lady bought Cookie - Clarence Curt, Sister JoAnn Brown - Joseph Brown - mother has phone # - 2 children - 12+10 - stayed about 20 minutes - picked up Ronald Brown at 3706 N. Robertson - 7:00 - drove around - drank beer - smoked weed - riding - close to 10 - she changed clothes - Mack - Mason strip - walked around - ~~went~~ stayed till about 4:00 a.m. parked car in front of Johnny's house -

Vickie Wallace
6220 N. Robertson
277-[illegible]

260

~~Saturday~~

Got up about 10:00 - spoke to Johnny about car
shaking - He drove around street — to shop-
Waited - came back - 20 min - will look at
later on — B. went to Ronald Craig's home
sister + Bro in law - Veronica - Lincoln Court -
2525 Lincoln Ct - no phone - Wayne + Donald
there - 2:00pm told Ronald about car - looked
at it - told B - about murder - hubcap
2 dr. - license plate changed - argued -
about car - left -

Back to Johnny's House - Asked Johnny about
car - Johnny said wasn't stolen - B
put everything together - told Johnny
about everything he had put together -
Went by Ronald's house to get mother's
hair dryer - took to mother - Back
to Johnny's House - ~~Brought~~ Parked
in front of Johnny's house -

Called Miss Williams - spoke to mother -
described car - checked license -
parked on Villa - met @ Clarkson
+ Franklin - Burger King - ~~Spoke~~ Miller
looked at car - to police car -
to office - questioned Bernie - 9:30 @
office -

8:00 night

Finished @ 2:30 a.m - Johnny buys B. lunch

Sunday

12:00- Miss Williams called - spoke to Johnny - asked about gun - B said he will find out B would call back -
Pinky's house 2-3 - Johnny stayed w/ the - Carter getting drunk and sacked - Pinky doing it - Walked in door - looking ~~[illegible]~~ out - ~~[illegible]~~ Sunday left at 5:00
Johnny brought home - called Miller - told Miller getting ready to leave town - someone ~~[illegible]~~ coming to get car -
Went back to Pinky's about 7 -
walked - Johnny, Black, B. front room - children - Cat - bedroom - & Pinky -
Pinky went to kitchen - ate - B just + the rest of group -
B left - walking - about 9:30 met Millar @ 11:00 Clarkson + Franklin - asked about gun + who was in town - getting on a Monday - Millar + B. riding around - Black, Officer -
12:00 - rode by Macon - trying to pass time till garbage put out -
Johnny + Black never left - cars still there - circled around till about
3:00 a.m. - Johnny got home before B.
Someone called Johnny + told about police.

NEW ORLEANS POLICE DEPARTMENT

☐ INCIDENT REPORT
☒ SUPPLEMENTAL REPORT

PAGE 1 OF 3

1. ITEM NUMBER: I-22732-84

EVENT

2. SIGNAL	3. INCIDENT	4. DATE/TIME OCCURRED	5. DIST	6. SECTOR		
10-18/30	Murder	9-20-84 2:PM	3rd		☐ SELF INITIATED ☐ FLAGGED DOWN ☒ CFS	
7. LOCATION OF OCCURRENCE		8. DATE/TIME OF REPORT	9. ZONE/SUBZONE	10. WEATHER	11. TEMP	12. LIGHTING / 13. BULLETIN REQD
5300 Old Gentilly Rd.		9-24-84		1	+75	G / ☒ YES ☐ NO

WITNESS/REPORTING PERSON/VICTIM

14. NAME (LAST, FIRST, MIDDLE)	☒ VICTIM ☐ REPORTING PERSON ☐ WITNESS ☐ PERSON INTERVIEWED	RACE	SEX	DATE OF BIRTH	VICTIM'S RACE/SEX
Dye, Dolores		W	F	Age 60	☒ 1601 WHITE ☐ 1602 BLACK ☐ 1603 OTHER ☐ 1610 MALE ☒ 1611 FEMALE

16. HOME ADDRESS	17. HOME PHONE	18. DRIVER'S LICENSE	OCCUPATION
5157 Wildair Dr.			

19. BUSINESS ADDRESS	20. BUSINESS PHONE	21. SOC. SECURITY NO	15. RESIDENCE STATUS
			☐ 630 N.O. RESIDENT ☐ 631 METRO RESIDENT ☐ 632 TOURIST ☐ 633 BUSINESS

22. SOBRTY	INJURY	TYPE INJURY	TREATED	MEDICAL	TRANS	23. TRANS. TO	24. DOCTOR/CORONER
1	1	One GSW to Head	x	x	x	City Morgue	Dr. Jerry Rosenberg

25. NAME (LAST, FIRST, MIDDLE)	☐ VICTIM ☐ REPORTING PERSON ☐ WITNESS ☐ PERSON INTERVIEWED	RACE	SEX	DATE OF BIRTH	VICTIM'S RACE/SEX
					☐ 1601 WHITE ☐ 1602 BLACK ☐ 1603 OTHER ☐ 1610 MALE ☐ 1611 FEMALE

27. HOME ADDRESS	28. HOME PHONE	29. DRIVER'S LICENSE	OCCUPATION

30. BUSINESS ADDRESS	31. BUSINESS PHONE	32. SOC. SECURITY NO.	26. RESIDENCE STATUS
			☐ 630 N.O. RESIDENT ☐ 631 METRO RESIDENT ☐ 632 TOURIST ☐ 633 BUSINESS

33. SOBRTY	INJURY	TYPE INJURY	TREATED	MEDICAL	TRANS	34. TRANS. TO	35. DOCTOR/CORONER

36. NAME (LAST, FIRST, MIDDLE)	☐ VICTIM ☐ REPORTING PERSON ☐ WITNESS ☐ PERSON INTERVIEWED	RACE	SEX	DATE OF BIRTH	VICTIM'S RACE/SEX
					☐ 1601 WHITE ☐ 1602 BLACK ☐ 1603 OTHER ☐ 1610 MALE ☐ 1611 FEMALE

38. HOME ADDRESS	39. HOME PHONE	40. DRIVER'S LICENSE	OCCUPATION

41. BUSINESS ADDRESS	42. BUSINESS PHONE	43. SOC. SECURITY NO	37. RESIDENCE STATUS
			☐ 630 N.O. RESIDENT ☐ 631 METRO RESIDENT ☐ 632 TOURIST ☐ 633 BUSINESS

44. SOBRTY	INJURY	TYPE INJURY	TREATED	MEDICAL	TRANS	45. TRANS. TO	46. DOCTOR/CORONER

ARRESTED SUBJECT

1	47. NAME OF ARRESTEE	RACE	SEX	DATE OF BIRTH	48. RIGHTS WAIVED ☐ YES ☐ NO	FORM NUMBER
	Kyles, Curtis	N	M	2-26-59		

49. ADDRESS	50. DATE/TIME ARREST	51. ARREST CREDIT	52. RIGHTS ADVISED BY
2313 Desire St.	9-24-84 10:40 AM	34	Dillman, J/Miller, J.

53. ARREST LOCATION	54. DIST.	55. ZONE	56. RELAT	57. TRANS. UNIT	58. TRANSPORTED BY
2313 Desire St.	3		10	3142	Dillman J/Miller, J.

59. SOBRTY	INJURY	TYPE INJURY	TREATED	MEDICAL	TRANS	60. TRANS. TO	61. DOCTOR/CORONER
1	x	x	x	x	x	CLU	x

☐ MUNICIPAL ☐ STATE ☐ JUVENILE	ALIAS	SOCIAL SECURITY	MAGISTRATE DATE	TIME
	Bootly			

62. CHARGES/COMMENTS

WORLD'S FAIR RELATED? 150. ☐ YES 151. ☐ NO

R.S. 14 Art. 30 - Relative to Murder of the above named victim.

REMARKS: Investigation revealed that subject fatally shot the victim during the commission of an armed robbery.

I, _____ (NAME PRINT) _____ (ADDRESS PRINT) _____ (DATE & TIME) _____ (RELATIONSHIP)

HEREBY TAKE CUSTODY OF THE ABOVE NAMED CHILD AND PROMISE TO BRING HIM/HER TO COURT, PROBATION DEPARTMENT, OR THE JUVENILE DIVISION, WHEN NOTIFIED

RELEASED BY (PRINT) _____ SIGNATURE OF CUSTODIAN _____

CODES

WEATHER	LIGHTING	RACE	SOBRIETY	INJURY	TREATED	MEDICAL/TRANS.	RELATIONSHIP TO VICTIM
1. CLEAR 2. CLOUDY 3. RAIN 4. SNOW 5. FOG 6. OTHER	G – GOOD F – FAIR P – POOR	I – Indian S – Spanish B – Negro W – White O – Oriental X – Other	1. SOBER 2. HBD 3. INTOX 4. DRUGS 5. UNKNOWN	1. Fatal 2. Critical Non-Fatal 3. Serious Non-Fatal 4. Severe 5. Moderate 6. Minor 7. No Injury	1. REFUSED 2. TREATED/ RELEASED 3. HOSPITALIZED	1. POLICE EMS 2. OTHER EMS 3. POLICE 4. CIVILIAN	1. HUSBAND/WIFE 2. FATHER/MOTHER 3. SON/DAUGHTER 4. BROTHER/SISTER 5. EMPLOYEE/EMPLOYER 6. FRIEND/ACQUAINTANCE 7. COMMON LAW 8. RELATIVES 9. STRANGER (KNOWN TO AREA) 10. COMPLETE STRANGER

ADM

63. OFFICER	64. TECHNICIAN	65. EMS / TOW / OTHER	66. ACCESS NUMBER
Dillman, John	Valteau, K.		

66. REPORTING OFFICER	BADGE	67. REPORTING OFFICER	BADGE	68. CAR	SUPERVISOR
Dillman, John	1309	Miller, John C.	2070	3142	D.A.

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Det. John Dillmann, assigned to the Homicide Unit of the Criminal Investigation Bureau, respectfully reports that at approximately 2:40 PM, Thursday, September 20, 1984, he was notified by Sgt. James Eaton that members of the Third District were currently in the 5300 block of Old Gentilly Rd, handling a signal 30 (Murder), and were requesting the assistance of a homicide team. Det. Dillmann immediately proceeded to that location, arriving at about 3:00 PM.

Upon his arrival, the following Units were observed on the scene;

Unit 310 – Manned by Lt. James Kavanaugh, supervising on the district level.

Unit 360 –Manned by Sgt. Anthony Cannetella, supervising on the district level.

Unit 325 –manned by Police Officers James Hernandez and Angela Davis, handling the Original Incident Report.

Unit 1802 – Manned by Emergency Medical Techs. L. Daggs and R. Stanley.

Det. Dillmann first spoke to Police Officers Hernandez and Davis who related the following sequence of events. At approximately 2:23 PM, these Officers responded to a officer needs assistance call, broadcast from the parking lot of Schwegmann Bros. Supermarket, located in the 5300 block of Old Gentilly Red. [sic] Officers Hernandez and Davis arrived on the scene minutes later where they met Officer Susan Eagan, manning Unit 5757, of the Orleans Parish Levee Board. Officer Eagan directed the Officers to the body of an elderly white female, lying in the parking lot. Officers Hernandez and

Davis then observed that the victim had suffered an apparent gunshot wound to the head. They immediately requested an emergency unit to a code three. Officers Hernandez and Davis then learned from Officer Eagan that she was at the intersection of France Rd., and Old Gentilly Red. [sic], when she was approached by a passerby. This subject informed Officer Eagan that a woman had just been shot in the parking lot of Schwegman [sic] Bros. Supermarket. Officer Eagan immediately proceeded into the parking lot where she observed the body of the elderly white female. Upon checking the condition of the victim, Officer Eagan broadcast a request for assistance. It was also learned from Officers Hernandez and Davis that shortly after the interview with Officer Eagan, Unit 1802 arrived on the scene. Emergency Medical Techs. Daggs and Stanley were unable to locate any vital signs of life and immediately informed the district officers. Officers Hernandez and Davis then requested the assistance of a homicide team and attempted to locate any witnesses to the fatal shooting. The district officers were able to locate several witnesses who informed them that the victim was approached by an unknown black male, while she was putting her groceries into the trunk of her vehicle. The victim and the perpetrator struggled over the victim's car keys. During the struggle, the perpetrator produced a handgun and shot the victim in the head. The perpetrator then fled in the victim's vehicle, a 1977 Ford Thunderbird, Red in color, bearing Louisiana License plate 607B944. Officers Hernandez and Davis then obtained a physical description of the perpetrator and broadcast this description, along with a description of the victim's vehicle, over all police chanels [sic]. The district officers then

detained the witnesses and preserved the crime scene, awaiting the arrivdal [sic] of the homicide detectives. A copy of the Original Incident Report has been made a part of the case file and is available, if deemed necessary.

Once the interview with the district officers was completed, Det. Dillmann initiated the scene investigation. The victim, an elderly white female, was observed lying in a prone position with her head facing in a lake direction. The victim's legs were crossed at the ankles, facing in a river direction. The victim's right arm was bent at the elbow, lying under the upper torso. The left arm was observed bent at the elbow, facing in a lake direction. It should be mentioned that the victim's body was located in Schwegmann Bros. parking lot, a large paved area located between Old. Gentilly Rd. and Chef Menteur Highway. The victim was clad in blue slakes [sic] and a white, short sleeve blouse. A pair of white ladies sandles [sic] and a pair of sunglasses, was observed adjacent to the victim's feet. A closer examination revealed that the victim suffered a single gunshot wound of the left temple.

At approximately 3:15 PM, Crime Lab Tech. Terry Duffy, manning Unit 3723, arrived on the scene. Tech. Duffy processed the entire crime scene. This consisted of the confiscation of all physical evidence, obtaining scene photographs, measuring the crime scene, and drawing a detailed scene sketch. A copy of the Crime Lab Techs. Report has been made a part of the case file. It is available, if deemed necessary.

At approximately 3:05 PM, Coroner's Chauffeur Horace White, manning Unit 2497, arrived on the scene.

At approximately 3:06 PM, Coroner's Investigator Steve Farrar, manning Unit 2498, arrived on the scene.

At approximately 3:55 PM, Assistant Coroner Dr. Jerry Rosenberg arrived on the scene and pronounced the victim dead. A preliminary examination by Dr. Rosenberg reflected that the victim suffered a single gunshot wound of the left temple. No exit wound was observed.

At approximately 4:05 PM, the victim's body was transported to the Orleans Parish Coroner's Morgue, for autopsy purposes.

Once the scene investigation was completed, Det. Dillmann requested the district personnel to transport the aforementioned witnesses to the homicide office. He then conducted a canvass of the immediate area, with negative results.

At approximately 4:30 PM, Det. Dillmann arrived at the homicide office where he entered the victim's license number into the N.O.P.D. motion computer. It was ascertained that Louisiana license number 607B-944 was registered to one Delores Dye. The plate belonged to a 1977 Ford, 2-Dr, Red in color. Several attempts were made to contact members of Mrs. Dye's family, in order that the victim could be positively identified. These efforts met with negative results.

Det. Dillmann next spoke to Edward Williams, black male, D.O.B. 10-04-67, residing 7611 Chef Menteur Highway, Apt. B-5. It was learned from Mr. Williams that he is a student at Abramson High School. At approximately 2:20 PM, this date, he was waiting for the bus on Chef

Menteur Highway, in front of Schwegmann Bros. Supermarket. While awaiting the bus, Mr. Williams heard a lady scream. He looked towards the parking lot and observed an elderly white woman struggling with a young black male. Mr. Williams thought that they were struggling over a purse and he observed that hte [sic] black male subject was holding the woman by the wrist. The black male subject then produced a handgun and placed it against the woman's head. He then fired one shot and the victim fell to the ground. The perpetrator then entered a Red or Maroon Ford Thunderbird and fled on Chef Menteur Highway, in a downtown direction. Upon further questioning, Mr. Williams stated that he was standing approximately fifty feet from the victim and the perpetrator, when the fatal shooting occured. he added that the perpetrator was a black male, dark skinned, black hair. He was clad in blue jeans and a black shirt. He further stated that this subject was armed with a dark colored handgun with a short barrel. Mr. Williams stated that he did not hear the perpetrator say anything to the victim and only heard one gunshot. He added that he did not know if he would be able to identify this subject, if he saw him again. A detailed, typewritten statement was then obtained from Mr. Williams. This statement has been made a part of the case file and is available, if deemed necessary.

Det. Dillmann next spoke to Isaac Smallwood, black male, D.O.B. 12-24-49, residing 3313 S. Saratoga St. It was learned from Mr. Smallwood that he is employed by Norco Construction Company. At approximately 2:20 PM, this date, Mr. Smallwood was working in Schwegmann's Bros. parking lot, near the gas pumps. Mr. Smallwood

was standing, facing Old Gentilly Rd., when he heard a gunshot. He then observed the victim lying on the ground and a red colored vehicle approaching him. The vehicle passed him and turned right on Chef Menteur Highway. He watched the vehicle which stopped for the red light at France Rd. Mr. Smallwood then walked over to where the victim was lying and observed that she had been shot. Upon further questioning, Mr. Smallwood stated that the subject driving the red colored vehicle was a black male, approximately eighteen years of age, dark skinned, with a light mustache and braided hair. He added that the subject was driving a 1978 or 1979 Red Thunderbird. He stated that when he first heard the gunshot, the black male subject was entering the aforementioned vehicle. He further stated that when the subject drove by him, the vehicle passed approximately fifteen feet from him. He stated that he would be able to identify this subject, if he saw him again. Mr. Smallwood then rendered a detailed, typewritten statement. This statement has been made a part of the case file and is available, if deemed necessary.

Det. Dillmann next spoke to Willie Jones, black male, DOB 12-31-38, residing 4177 W. Loyola Ave., Kenner, La. It was learned from Mr. Jones that he is also employed by Norco Construction Company. At approximately 2:20 PM this date, he was working in the parking lot of Schwegmann Bros. Super Market, 5300 Old Gentilly Highway. Mr. Jones observed the victim walking to her vehicle, carrying two bags of groceries. The victim opened the trunk of her car and placed the groceries, along with her purse, inside the trunk. As she closed the trunk of the vehicle, she was approached by a black male subject. This

subject grabbed for her car keys and the victim ran to the passenger side of the vehicle. The subject followed and they struggled over the car keys. The victim broke away and ran back to the rear of the vehicle. The black male then grabbed the victim's arm and reached into his pocket, producing a small handgun. The victim began screaming and the subject palced [sic] the weapon to her head. He then fired one shot, directly into the victim's head. The victim immediately fell to the ground and the perpetrator slowly walked to the drivers side of the vehicle. He then entered the victim's car and drove off slowly. The perpetrator drove through the parking lot, onto Chef Menteur Highway, heading in a downtown direction. Upon further questioning, Mr. Jones stated that he was working near the gas pumps, a short distance from where the victim's vehicle was parked. He stated that the perpetrator was a black male, approximately eighteen years of age, five feet, nine inches tall, one hundred and forty pounds. He was dark skinned and his hair was platted. Mr. Jones added that this subject was wearing blue jeans, and a dark colored, short sleeve shirt. He stated that this subject was armed with a small handgun, dark in color, with a short barrel. He stated that the perpetrator fled in the victim's vehicle, a 1976 or 1977 Thunderbird. This vehicle was Maroon in color and has a white interior. Upon further questioning, Mr. Jones stated that the perpetrator was not attempting to steal the victim's purse. He added that the purse was in the trunk of the car and he was struggling over the keys. He further stated that the subject only fired one shot. He stated that he was holding onto the vcitim's [sic] arm when he fired the fatal shot. He stated that he got a good look at the perpetrator

and would be able to identify him, if he saw him again. Mr. Jones then rendered a typewritten statement which has been made a part of the case file. This statement is available, if deemed necessary.

Once the interview iwth [sic] Mr. Jones was completed, Det. Dillimann [sic] spoke to Mr. Henry Williams, black male, DOB 10-01-34, residing at 1524 France St. It was learned from Mr. Williams that he is employed by Norco Construction Company and was talking to Mr. Willie Jones, when the offense occurred. Mr. Williams stated essentially the same account of the incident, as did Mr. Jones. Upon questioning, Mr. Williams stated that the perpetrator was a black male, approximately twenty years of age, five feet, five inches tall, one hundred and fifty pounds, medium build, dar [sic] skinned, with platted hair. He added that this subject was clad in blue jeans and a dark colored, pull over, short sleeve shirt. He stated that this subject was armed with a .22 or .32 caliber handgun. He stated that this weapon was dark in color with a short barrel. Mr. Williams further stated that after the perpetrator shot the victim, he fled in the victim's 1979 Red Thunderbird. He added that he observed the perpetrator as he drove by and would be able to identify him, if he saw him again. Mr. Williams then furnished the investigating detective with a detailed, typewritten statement. This statement has been made a part of the case file and is available, if deemed necessary.

Det. Dillmann next spoke to Mr. Lionel Plick, black male, DOB 8-14-22, residing 3826 Gibson St., Apt. A. It was learned from Mr. Plick that at approximately 2:20

PM, he was waiting for the bus on Chef Menteur Highway, adjacent to the Schwegman's [sic] Bros. Supermarket. Mr. Plick heard a woman scream and turned in the direction of the parking lot. He then observed the victim, struggling with a black male. The black male then produced a handgun and shot the victim in the head. The perpetrator then entered a Red colored vehicle and drove out of the parking lot. Upon further questioning, Mr. Plick stated that the perpetrator was a black male, early twenties, five feet, ten inches tall, slender build, wearing a dark colored shirt. Upon further questioning, Mr. Plice [sic] stated that the perpetrator was armed with a small handgun. He added that this subject placed the weapon to the victim's temple and fired one shot. He went onto say that he did not know if he would be able to identify the perpetrator from a photograph. He stated that if he saw the subject in person, he might be able to make an identification. Mr. Plick then furnished the investigating detective with a detailed, typewritten statement. This statement has been made a part of the case file and is available, if deemed necessary.

It should be mentioned that while in the homicide office, Det. Dillmann received a telephone call from Mr. Robert Territo. Mr. Territo informed the investigating detective that at approximately 2:20 PM, he was passing Schwegmann's Bros. Supermarket. He added that he was stopped for the traffic light when he heard a woman scream. He then witnessed the fatal shooting of the victim and observed the perpetrator flee the scene. Det. Dillmann then scheduled an appointment with Mr. Territo for the following morning. Mr. Territo's subsequent statement will be covered, later in this report.

On the morning of September 21, 1984, Det. Dillmann proceeded to the Orleans Parish Coroner's Office. It was learned that the victim had been identified as one Dolores Dye, white female, age 60 yrs., formerly residing at 5157 Wildair Dr., New Orlean [sic], La. This identification was made by the victim's husband, Mr. Robert L. Dye. At approximately 9:30 AM, Dr. Richard Tracy performed an autopsy on the body of the victim, Dolores Dye. It was reveled that the victim suffered a single gunshot would of the left temple. A large amount of peppering and tatooing [sic] was observed around the wound, indicating that the weapon was four to eight inches from the victim's head when fired. Additionally, a spent lead nose pellet was recovered from the victim's skull. This pellet was marked for identification and sent to the crime lab for analysis. It should also be mentioned that Crime Lab Tech. Terry Duffy photographed the autopsy and removed fingernail scrappings from under the victim's fingernails. This evidence was also marked for identification and sent to the crime lab for analysis. A copy of the Coroner's Day Record has been made a part of the case file.

At approximately 10:30 AM, September 21, 1984, Det. Dillmann met with Robert Territo, white male, DOB 12-03-65, residing 508 Yetta St., Harvey, Louisiana. This meeting took place in the homicide office of the Criminal Investigation Bureau. It was learned from Mr. Territo that at approximately 2:20 PM, September 20, 1984, he was driving his company truck, on Chef Menteur Highway. As Mr. Territo reached France Rd, he stopped for the red light. He then heard a woman and looked into the Schwegmann Bros. parking lot. He then observed an elderly white female running from her parked vehicle.

This woman ran from the driver's side of the vehicle to the rear of the car. When she stopped, Mr. Territo observed that the woman was running from a young black male. This subject then attempted to take the woman's purse. A struggle ensued and this subject produced a small handgun. He then placed the weapon to the woman's head and fired one shot. Once the victim fell to the ground, the perpetrator jumped into the victim's parked vehicle. He then slowly drove throught [sic] the parking lot, onto Chef Menteur Highway. The perpetrator then pulled directly in back of Mr. Territo's truck and waited for the light to turn green. The perpetrator became inpatient [sic] and pulled around Mr. Territo. Mr. Territo was able to obtain the license number of the perpetrator's vehicle and wrote it down on a small piece of paper. he then continued to his place of employment and notified the police. Upon further questioning, Mr. Territo stated that he was approximately thirty yards from the victim when she was fatally shot. He stated that he first looked in the direction of the victim when he heard her scream. He added that he was close enough to her, to hear her scream. He stated that he did not see the perpetrator until the victim reached the rear of the parked vehicle. He went onto say that the victim and the perpetrator struggled over her purse. He stated that he did not get a good look at the purse but noted that it has a strap. He stated that he actually observed the subject place the weapon to the victim's head and pull the trigger. The perpetrator then jogged back to the victim's park [sic] vehicle and drove onto Chef Menteur Highway. Upon further questioning, Mr. Territo stated that the perpetrator was armed with a small handgun. The handgun fit into the palm of

this subject hand. He stated that when this subject pulled directly behind him, he was able to get a good look at him. He described the perpetrator as being a black male, approximately twenty-eight years of age, six feet tall, slim build, and dark skinned. He added that this subject's hair was "wooly" and worn in plats. He stated that this subject was clad in a dark colored shirt and blue jeans. He further stated that he would be able to identify this subject, if he saw him again. He then stated that eh [sic] wanted subject made good his escpae [sic] in a 1976 or 1977 Ford Thunderbird. He stated that he was able to obtain the license number, Louisiana plate 607B944. He added that the perpetrator made a right on France Rd, then in an unknown direction. Mr. Territo then rendered a detailed, typewritten statement. This statement has been made a part of the case file and is available, if deemed necessary.

At approximately 5:30 PM, September 22, 1984, Correctional Officer Shirley Delandro received a telephone call from a black male subject. This subject identified himself as one James Joseph. This subject informed Officer Delandro that on September 20, 1984 he purchased a Red Thunderbird from a friend named "Curtis". He added that when he purchased the vehicle, he did not know that it was stolen. He went onto say that he read about the murder of Mrs. Dolores Dye in the morning paper and thinks that he purchased the victim's vehicle. Officer Delandro then asked this subject if he would meet with one of the homicide detectives that were handling the investigation. This subject then informed Officer Delandro that he would meet one of the detectives at the intersection of Franklin and N. Claiborne Sts. He added

that he would meet the Dets. at approximately 10:00 PM and that he would be wearing a Green hospital shirt, blue jeans, along with a plastic cap.

Once this information was obtained, Officer Delandro immediately contacted Det. John Miller, assigned to the homicide division of the Criminal Investigation Bureau. Det. Miller, accompanied by Sgt. James Eaton, met this subject at the pre-determined time and location. (It should be mentioned that Det. Miller was wired with a body mike at the time of the meeting. The conversation was taped and has been made a part of the case file).

This subject, later identified as one Joseph Wallace, AKA Joseph Banks, black male, 21 yrs. of age, residing 2862 N. Dorgenois St., directed Det. Miller to the corner of Franklin and N. Villere Sts. Once at this location, Det. Miller observed a 1977 Ford LTD, Red in color, bearing Louisiana plate 68E754. It was then determined that this vehicle VIN # 7A30F105776, belonged to the victim, Dolores Dye, and that the current plate on the vehicle was stolen.

At approximately 12:05 AM, September 23, 1984, Crime Lab Tech. James Treadaway arrived on the scene. Tech. Treadaway photographed the vehicle and impounded it for investigation of murder. This vehicle was subsequently towed to the Crime Lab Cage for processing.

Once the victim's vehicle was recovered, Det. Miller transported Joseph Banks to the Homicide Office. At approximately 12:30 A.M., September 23, 1984, Det. Miller conducted an extensive interview with Joseph Banks.

It was learned from Mr. Banks that he is a self-employed brick layer. He notified the police because his brother-in-law told him that the vehicle that he had just purchased was stolen and involved in a murder. He stated that he purchased the vehicle from a subject named "Curtis" on priday, [sic] September 21, 1984. Upon further questioning, it was learned that Joseph Banks was at a friends house on Friday, September 21, 1984 when the friend, Claude Burns, received a telephone call. The caller was subject known to Banks as "Curtis". Claude Burns spoke to Curtis for several minutes. Claude then asked Joseph Banks if he wanted to take a ride with him. Claude Burns and Joseph Banks then drove to the 2300 block of Desire St. After visiting with a black female, they proceeded to an unknown lication [sic] on Mazant St. At this location, they met "Curtis" who was with a subject named "Ricky". Curtis was standing next to a 1977 Ford, LTD, Red in color. Curtis asked Joseph Banks if he wanted to buy the Ford. Curtis told him that he was going to give the car to his old lady but that he was mad at her. He told Banks that he would sell him the vehicle for four hundred dollars. Banks then told Curtis that he would buy the vehicle. Joseph Banks then observed that there were several grocery bags in the Ford, along with a woman's purse on the front seat. Joseph Banks then helped Curtis unload the Ford LTD. They removed several Schwegmann's grocery bags from the trunk and back seat of the vehicle. Curtis then removed the ladies purse from the front seat of the vehicle. He informed Joseph Banks that the purse belonged to his old lady, Pinkie. All of the groceries were loaded into a vehicle belonging to Curtis's

friend, "Ricky". Joseph Banks then drove the aforementioned Ford to the Desire street address where he again met Curtis. He then assisted Curtis in unloading the groceries and carrying them into his residence. Joseph Banks then gave Curtis the four hundred dollars for the Ford and Curtis told him that he would have the titles for him, the following day. Banks then left the residence. Upon further questioning, it was learned from Joseph Banks that at approximatley [sic] 9:30 PM, September 21, 1984 he received a telephone call from the subject, "Curtis". Curtis then asked Joseph Banks if he would give him a ride to pick up his car. Banks then proceeded to the Desire street address and picked up Curtis. He was then directed to the parking lot of Schwegmann's Bros. Supermarket, located in the 5300 block of Old Gentilly Rd. Curtis directed Banks to his parked vehicle in the parking lot. He told Banks that the engine would not crank the previous day. When Curtis entered his vehicle, the vehicle started up immediately. Upon further questioning, Joseph Banks stated that his knowledge, the subject Curtis owns two handguns. He added that the subject Curtis owns a .32 caliber and a .38 caliber revolver. He stated that both weapons are dark in color and have short barrels. He further stated that this subject "Curtis" is positively the subject that sold him the 1977 Ford, LTD.

Once this information was obtained, Joseph Banks accompanied Det. Miller and Sgt. Eaton, to the parking lot of Schwegmann Bros. Supermarket. Once at this location, he pointed out the exact location where the subject "Curtis", had his vehicle parked. He then directed the detectives to a residence, located in the 2300 block of Desire St. The residence, bearing the municipal number

2313 Desire, is the residence where the subject, "Curtis", resides. Joseph Banks was then transported back to the homicide office.

It should be mentioned that upon returning to the homicide office, Det. Miller entered the Desire Street address into the N.O.P.D motion computer. It was learned that one Curtis Kyles, black male, DOB 7-26-59, was arrested on 5-25-84 for possession of stolen property. At the time of his arrest, he gave the address of 2313 Desire St.

Once this information was obtained, Det. Miller conducted a photographic line-up, including a photograph of Curtis Kyles. Joseph Banks viewed the line-up and was able to positively identify Curtis Kyles as being the subject that sold him the victim's stolen vehicle. Joseph Banks then rendered a detailed, typewritten statement. This statement, along with the photographic line-up, have been made a part of the case file. They are available, if deemed necessary.

Upon reporting for duty at 4:00 P.M., September 23, 1984, Det. Dillmann met with Det. Miller and Sgt. Eaton. The investigating detective was advised of the recovery of the victim's stolen vehicle and the statement rendered by Joseph Banks. Det. Dillmann immediately prepared an Application For Search Warrant for 2313 Desire St. A copy of this application has been made a part of the case file. It is available, if deemed necessary.

At approximately 6:07 PM, September 23, 1984, Magistrate Judge Buzzy Keifer reviewed the aforementioned Application For Search Warrant. Judge Keifer then signed a Search Warrant for the residence, bearing the municipal

number, 2313 Desire St. This Search Warrant also has been made a part of the case file.

It should also be mentioned that the investigating detective prepared an Affidavit For Warrant of Arrest, listing Curtis Kyles, black male, DOB 7-26-59, residing 2313 Desire St., in the Warrant. At approximately 6:10 PM, September 23, 1984, Magistrate Jedge [sic] Buzzy Keifer reviewed the affidavit and subsequently signed the Arrest Warrant. This Affidavit, along with the Warrant Of Arrest, has been made a part of the case file. It is available, if deemed necessary.

On the morning of September 24, 1984, members of the Criminal Investigation Bureau, conducted a surveilance [sic] of 2313 Desire St. At approximately 10:40 AM, a black male exited the residence. This subject was reconized [sic] as being Curtis Kyles and he was immediately arrested without incident. Det. Cyril Davillier verbally advised Kyles of his constitutional rights. He was subsequently transported to the homicide office, arriving at approximately 11:00 AM.

Once the arrested subject cleared the scene, the aforementioned Search Warrant was served at 2313 Desire St. The following evidence was located in the residence;

1- Eight Schwegmann's Bros. grocery bags, located in a kitchen cabinet.

2- One H&R .32 caliber revolver, model 732, serial number AL79962, containing five live FC S&W .32 caliber rounds and one spent FC S&W .32 caliber cartridge. This weapon was located behind the kitchen stove.

3- One homemade holster, along with one box of 20 gauge shotgun shells, confiscated from a cedar chest, in a bedroom of the residence.

4- One brown case, containing forty live cartridges of various calibers. This case was located in the dresser draw [sic] in the bedroom of the residence.

5- One box of FC S&W .32 caliber live cartridges. This box of cartridges was located in a dresser draw [sic], in a bedroom of the residence.

6- One Stevens/Westfield .22 caliber Rifle, model 887, serial number C684004, containing one live .22 caliber round. This weapon was located under matress [sic] in a bedroom of the residence.

7- Fourteen, .22 caliber, Super X cartridges, located under a matress [sic], in a bedroom of the residence.

8- Various cans of Cat food, located in the kitchen of the residence.

At approximately 11:40 A.M., September 24, 1984, Crime Lab Tech. Keith Valteau, arrived at the Desire Street address. Tech. Valteau photographed the aforementioned evidence and dusted this evidence for latent prints. It should be mentioned that Tech. Valteau was able to lift several partial prints from the Schwegmann grocery bags and the aforementioned cat food. The evidence was subsequently confiscated and brought to the Property and Evidence Section for processing. A copy of the Crime Scene Techs. Report, submitted by Tech. Valteau has been made a part of the case file.

Once the search of 2313 Desire St., was completed, Det. Dillmann returned to the Homicide Office. At approximately 12:30 PM, September 24, 1984, Det. Dillmann again advised Curtis Kyles that he was under arrest

for the murder of Dolores Dye. Det. Dillmann verbally advised Kyles of his constitutional rights. Curtis Kyles then stated that he understood his rights. he stated that he didn't kill anybody and didn't have anything else to say. The arrested subject was then secured in a holding cell, located in the Criminal Investigations Bureau.

The investigating detective, along with Det. Donald Saucier, next proceeded to the 5300 block of Old Gentilly Rd. Once at this location, they met with Isaac Smallwood, black male, DOB 12-24-49, residing 3313 S. Saratoga St. As mentioned earlier in this report, Mr. Smallwood was a witness to the fatal shooting of Mrs. Dye. Mr. Smallwood was then shown a photographic line-up, containing a photograph of Curtis Kyles. Mr. Smallwood was able to positively identify the photograph of Kyles as being the subject he saw shoot the victim, Dolores Dye. He then signed the photograph for identification purposes.

Det. Dillmann next showed the photographic line-up to Willie Jones, black male, DOB 12-31-38, residing 4177 W. Loyola Ave., Kenner, Louisiana. Mr. Jones works for Norco Construction Company and was also an eye witness to the murder of Dolores Dye. Mr. Jones viewed the line-up and was able to make a tenative [sic] identification of the photograph of Curtis Kyles.

Another eye witness to the murder of Dolores Dye was Henry Williams, black male, DOB 10-01-34, residing 1524 France St. Mr. Williams is also employed by Norco Construction Company and was working in the area of the 5300 block of Old Gentilly Rd. Mr. Williams then viewed the photographic line-up and was able to positively identify Curtis Kyles, as being the subject that shot

and killed Dolores Dye. Mr. Williams also signed and dated the photograph for identification purposes.

Dets. Dillmann and Saucier next located Robert Territo, white male, DOB 12-03-65, residing 508 Yetta St., Harvey, La. another eye witness to the fatal shooting of Dolores Dye. Mr. Territo viewed the photographic line-up and was able to positively identify the photograph of Curtis Kyles. He then signed and dated the photographs, for identification purposes. This photographic line-up has been made a part of the case file. It is available, when deemed necessary.

As previously mentioned, the victim's stolen vehicle was removed and locked in the N.O.P.D. Crime Lab cage. On September 24, 1984, Tech. Terry Duffy again photographed the stolen vehicle. He also dusted the exterior of the vehicle for latent fingerprints. Tech. Duffy was able to lift four partial fingerprints from various locations on the exterior of this vehicle. Additionally, on September 25, 1984, Tech. Duffy processed the interior of this vehicle. The interior of the vehicle, along with the contents of the vehicle, were dusted for latent fingerprints. Tech. Duffy was able to lift several partial fingerprints from a Schwegmann Bros. sales slip, located on the floorboard of this vehicle. All of the confiscated evidence was subsequently entered into evidence and sent to the crime lab for analysis. A copy of the Crime Lab Tech's Report, submitted by Tech. Duffy, has been made a part of the case file.

It should also be mentioned that in the early morning hours of September 24, 1984, Dets. Pascal Saladino and

Robert Lambert proceeded to 2313 Desire St. These detectives has [sic] been instructed to confiscated any garbage from in front of 2313 Desire St. At approximately 1:00 AM, September 24, 1984, they located five plastic garbage bags, near the curb, in front of 2313 Desire St. These bags were confiscated by the detectives and brought to the Evidence and Property Section. Once placed into evidence, they were locked in the NOPD Crime Lab Cage.

At approximately 4:00 PM, September 24, 1984, Det. Dillmann secured this evidence and brought it to the N.O.P.D. Crime Lab.

Det. Dillmann, along with Tech. Tim Seuzeneau, emptied the plastic garbage bags and spread their contents on the crime lab floor. In the fourth bab [sic] searched, a brown leather ladies purse was located. This purse contained numerous credit cards and personal papers, in the name of Dolores Dye. Tech. Seuzeneau photographed the contents of the purse and dusted the material for latent fingerprints. This evidence was then entered into evidence and kept for further analysis. A copy of the Crime Lab Tech's Report, submitted by Tech. Seuzeneau, has been made a part of the case file. It is available, if deemed necessary.

On September 25, 1984, Firearms Examiner Otho Stubbs conducted a firearms identification test on the recovered .32 caliber revolver, confiscated from 2313 Desire St., and the spent pellet recovered from the body of the victim. This test concluded that the spent pellet recovered from the skull of Dolores Dye was fired from the weapon recovered from 2313 Desire St. A copy of the

Crime Lab Report, submitted by Tech. Stubbs, has been made a part of the case file.

On September 27, 1984, Det. Dillmann received an Interoffice Correspondence from Police Officer Kenneth Solis, assigned to the Criminal Records Unit. It was learned that the latent fingerprints, recovered from Schwegmann Bros. sales slip, located on the floorboard of the victim's vehicle, belonged to the arrested subject, Curtis Kyles. Two separate prints were identified, the right Index finger and the right little finger. A copy of this Interoffice Correspondence has been made a part ofthe [sic] case file. It is available, if deemed necessary.

As of the completion of this report, it has been clearly established that the arrested subject, Curtis Kyles, killed Dolores Dye during the perpetration of an Armed Robbery. Kyles has been positively identified by four eye witnesses, through the use of a photographic line-up. Additionally, the murder weapon has been recovered from the residence of the arrested subject, Curtis Kyles. It has also been established that the victim's purse and vehicle were stolen after the fatal shooting. The recovered vehicle has been linked to the arrested subject and his fingerprints have been recovered from a sales slip, located inside the vehicle. The victim's stolen purse has also been recovered from a bag of garbage, located in front of the arrested subjects residence.

Office of the District Attorney to be consulted.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3310

CURTIS LEE KYLES,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary
and RICHARD P. IEYOUB, Attorney
General, State of Louisiana,

Respondent-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/14/93, 5 Cir., ___, ___ F.2d ___)

(November 12, 1993)

Before KING, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 93-7927

Curtis L. Kyles,

Petitioner

v.

John P. Whitley, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 25, 1994

Supreme Court, U.S.
FILED
JUN 17 1994
OFFICE OF THE CLERK

No. 93-7927

In The

Supreme Court of the United States

October Term, 1993

CURTIS LEE KYLES,

Petitioner,

versus

JOHN P. WHITLEY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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QUESTIONS PRESENTED

1. *Whether production by State of exculpatory materials, proper prosecutorial conduct, and effective performance by Petitioner's trial counsel would have resulted in acquittal or mistrial?*

2. *Whether production by State of exculpatory materials, proper prosecutorial conduct, and effective performance by Petitioner's trial counsel would have produced sufficient residual doubt in the mind of at least one juror to result in a life sentence rather than the death penalty?*

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OTHER AUTHORITIES:

Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* (1989) 37

Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987) 38

Gorestein & Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. Applied Psychol. 616 (1980) 38

Huff, Rattner, and Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Deliq. 518 (1986) 38

Loftus and Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. Applied Psychol. ___ (1994) (in press) 39

Loftus and Greene, *Warning: Even Memory For Faces May Be Contagious*, 4 Law & Human Behavior 323 (1980) 38

Wells, *What Do We Know About Eyewitness Identification?*, 48 Amer. Psychologist 553 (1993) 38

5 J. Wigmore, Evidence § 1367 (Chadbourne Rev. 1974) 37

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 5 F.3d 806 (CA5 1993), and is reproduced in the Joint Appendix (JA) at 40. The memorandum opinion of the United States District Court for the Eastern District of Louisiana is reproduced at JA 137.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was rendered on October 14, 1993. A petition for rehearing was denied on November 12, 1993. The petition for writ of certiorari was filed on February 10, 1994 and granted on April 25, 1994. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense;

the Eighth Amendment, which provides in relevant part:

> [N]or [shall] excessive fines [be] imposed, nor cruel and unusual punishments [be] inflicted;

and the Fourteenth Amendment, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

This case also involves the following Louisiana statutes, which are reprinted in Appendix A:

> Louisiana Revised Statute 14:30
>
> Louisiana Code of Criminal Procedure, Article 905.2.

STATEMENT OF THE CASE

i. Course of the Proceedings[1]

Curtis Kyles was tried for first degree murder on Nov. 26, 1984. The jury was unable to reach a verdict, and a mistrial was declared. He was tried again on Dec. 6-8, 1984, convicted of first degree murder and sentenced to death. His conviction and sentence were affirmed on direct appeal. *State v. Kyles*, 513 So.2d 265 (La. 1987), *cert. denied*, 486 U.S. 1027 (1988).

Petitioner sought collateral review in state court. The trial court denied relief. The Louisiana Supreme Court remanded the case for an evidentiary hearing. *State ex rel. Kyles v. Whitley*, 535 So.2d 750 (La. 1989). The trial court issued a judgment against petitioner after the hearing. JA 31. The supreme court denied discretionary review by a vote of 5 to 2. *State ex rel. Kyles v. Whitley*, 566 So.2d 386 (La. 1990).

Petitioner then filed a petition for habeas corpus in the United States District Court for the Eastern District of Louisiana on Oct. 30, 1990. Kyles filed a supplemental and amending petition on November 1, 1990.[2] Following exhaustion of state remedies, the district court ordered additional briefing. The court issued its Order and Reasons denying relief on March 24, 1992, JA 137, and issued its Judgment on March 30, 1992. JA 39.

---

[1] References in this brief are being made to the following: record on appeal in the Court of Appeals as "RA"; Joint Appendix as "JA"; trial record as "R vol#"; trial transcript as "Tr"; state postconviction hearing as "H month/day". All postconviction hearings were held in 1989. Exhibits at the state postconviction hearing are referred to as "D-#"; Appendix B lists all exhibits with pages at which exhibit appears, is offered in evidence, and admitted.

[2] All proceedings were stayed in order to allow exhaustion of supplemental claims that have since been mooted by a statutory amendment.

On April 2, 1992, the district court granted a certificate of probable cause to appeal. On May 14, 1992, petitioner filed a motion pursuant to Fed.R.Civ.P. 60(b)(2) and (6) requesting the district court to reopen judgment.[3] The court refused to review the merits, finding that the motion constituted abuse of the writ. Petitioner filed a notice of appeal and moved the circuit court to consolidate the two appeals. The Fifth Circuit denied the motion to consolidate, holding that "a habeas petitioner may not use Rule 60(b) to raise constitutional claims that were not included in his original habeas petition." *Kyles v. Whitley*, No. 92-3310, 92-3542 (CA5 Aug. 7, 1992) (unpublished).

On appeal, petitioner argued three issues: the prosecution's nondisclosure of favorable material to the defense and presentation of false evidence violated due process, the prosecutor's threats of criminal prosecution to defense witnesses for crimes associated with the murder violated due process, and petitioner's trial counsel was ineffective. After briefing and argument, the Fifth Circuit affirmed the decision of the district court by a vote of 2 to 1. *Kyles v. Whitley*, 5 F.3d 806 (CA5 1993).[4]

---

[3] In this motion, petitioner charged that one of the state's eyewitnesses had committed perjury. Attached to the motion is an affidavit of Darlene Kersh (formerly Cahill) wherein she states that the prosecution urged her to testify falsely. Kersh explains that she told the prosecutors and detectives she did not have an opportunity to view the assailant's face and could not identify him. Nonetheless, she assented to the state's wishes because of assurances that Kyles was guilty. RA. 22-41.

[4] Following this decision, Kyles again sought state collateral review, by alleging that Darlene Kersh, (formerly Cahill) a state witness at trial, committed perjury and the prosecution suborned this perjured testimony. The Louisiana Supreme Court granted discretionary review and ordered the trial court to conduct an evidentiary hearing. *State ex rel. Kyles v. Whitley*, 629 So.2d 1145 (La. 1993). Following this Court's grant of certiorari, the Louisiana Supreme Court stayed all proceedings associated with the state postconviction proceeding. *State ex rel.*

ii. Material Facts

Part I: *The Crime Through The Trial*

A. The Murder of Delores Dye

On September 20, 1984, at 2:20 p.m., Delores Dye came out of Schwegmann Brothers' Giant Supermarket and walked with her groceries to her car in the parking lot. There she was confronted by a young man who struggled momentarily with her over something she carried, either her purse or her car keys.[5] She screamed, attracting the attention of several witnesses. The man fired a gun into her head and then fled the parking lot in her car.

Within minutes, New Orleans police officers were on the scene. A description of the man responsible for the murder[6] was broadcast on all police channels, and all officers were additionally told to look for the victim's car, a 1977 red Ford Thunderbird.[7] JA 265.

The police took signed statements from Henry Williams, Willie Jones, Edward Williams, Lionel Plick, Isaac Smallwood, and Robert Territo. JA 188-213, 191. Each witness was in or around the parking lot during the shooting, and described the crime and the perpetrator.

The police questioned, Robert Dye, the victim's husband about any other property that might have been stolen in the armed robbery, D-16, and were told that a

---

Kyles v. Whitley, No. 94-KP-0772, (La. May 5, 1998) (unpublished order).

[5] Witnesses differed on this and other facts. *See infra* at 14-15, 34-39.

[6] The police broadcast: "a black male, late teens to early twenties, five feet nine to five feet ten inches tall, one hundred and forty pounds, platted (sic) hair." Daily, D-16.

[7] The victim's car was an LTD. JA 276. A number of witnesses thought it was a Thunderbird. JA 265, 268-75.

child's toilet was probably in his wife's possession.[8] Tr 180. Dye informed the police, as he later testified, that the victim was shopping for the week and would likely have had a lot of groceries. Tr 181.

Delores Dye's car was recovered by the New Orleans police two days after the murder, late in the evening of Saturday the 22nd. A man identifying himself on the telephone as James Joseph[9], but commonly called Beanie, had informed the police that he had a car he thought belonged to the murdered woman.[10] Beanie met with Det. John Miller to surrender the car. He told Miller that Curtis Kyles had sold him the car the previous day, Friday September 21st, for $400.00.[11] Beanie said that the next day he either read or was told about the murder, and only then began to suspect that the car was the victim's. JA 215.

Early Monday morning the 24th, the police seized garbage bags from the street in front of the Desire Street apartment where Kyles lived; in one of those bags was found the victim's handbag containing various credit cards and other identifying information. Also found in the refuse were a number of Schwegmann grocery bags.

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[8] This information was the basis for including a child's toilet in the eventual search warrant. R vol I 96.

[9] JA 275. The man also used the names Joseph and Beanie Banks, JA 276, 227, and Joseph Brown, D-12. His real name was Joseph Wallace. Tr 92. He will be referred to herein as Beanie, as he was at trial.

[10] Beanie told the officer who answered the phone that he had purchased a red Thunderbird from a friend named Curtis on Thursday, September 20th. He said he then read about the murder in the morning paper and surmised that the car was stolen. JA 275.

[11] Beanie was acquainted with Kyles through Pinky Burnes. Beanie lived with Pinky's brother, Johnny Burnes, at Burnes's mother's home. Also, Beanie was romantically interested in Pinky. Kyles lived with Pinky and their four children. Tr 328-329.

Tr 66. The police arrested Kyles the same day, and served a search warrant immediately after the arrest. Seized pursuant to the warrant were a .32 revolver, found hidden behind the stove, a homemade holster, a number of bullets of varying calibers, including .32's, several cans of dog and cat food, a .22 rifle found between mattresses of Kyles's bed, and eight empty brown paper grocery bags from Schwegmann. R vol I 99, Tr 66.

After Kyles was in custody, Det. John Dillman, the case investigator, put together a photo lineup and went to the witnesses from whom he had taken statements following the homicide. Territo, Smallwood, and Henry Williams picked Kyles's photograph out of the lineup. R vol II 2-7. Edward Williams and Jones could not positively identify Kyles[10] and did not testify at trial. The record does not reveal whether Lionel Flick was ever re-interviewed.

B. *The Trial of Curtis Kyles*

1. The State's Case

Territo, Smallwood, and Henry Williams testified at trial that they saw the murder of Mrs. Dye and the armed robbery of her car and its contents. Tr 11-24, 40-58. Each testified to the photo lineup conducted by the police, and identified Kyles in court, as they had at the first trial and at the hearing on a motion to suppress their identification testimony. R vol II 11-32. Darlene Cahill (now Kersh) testified that she had been a passenger in an automobile travelling alongside the parking lot, saw the struggle, heard the scream and the shot, and turned back to see the woman fall. Tr 29-30. She said she saw the side of the man's face from about a car-length distance, and she too identified Kyles. Tr 31-32. Neither she nor the driver of

[10] This fact was evidenced only by Det. Dillman's testimony at the hearing on the motion to suppress. R vol I 10.

the car, her cousin, were ever asked to participate in any identification procedures. Tr 38.

The witnesses thought that the victim had struggled with the perpetrator over her car keys (Smallwood, Tr 42) or her purse (Territo, Tr 12). Territo said he could not see the object well because it was on the side of the woman's body away from him, but that he saw the perpetrator when the man passed him in the victim's car. At that time, Territo noted the license plate.

Smallwood and Territo both testified that the man's hair was braided. Tr 26, 48. On cross-examination they were asked if the photographs they had been shown included one of Beanie; they said no. Territo said that a week before the second trial he had been shown a photograph of Beanie and asked "if this here could have been the guy that did it. I told him no." Tr 24.

Henry Williams stated that the woman had placed her packages in the trunk of her car when the man first grabbed her. He said that she pulled away and ran a short distance, when the man grabbed her again and then shot her. He said it "had to be" her keys they struggled over. Tr 52.

Det. Dillman identified photographs of the garbage taken from the street in front of Kyles's apartment[11], and the items seized in the search following Kyles's arrest. Tr 65-75. He stated that there was no evidence of a cat in the house, and that he looked out the back window and did not see a dog. Tr 74-76. On cross he admitted that one of the police photographs of Kyles's apartment showed a half-empty bottle of Hartz flea shampoo in a chiffonobe. Tr 99.

Det. Dillman stated that the information provided by Beanie was the basis for the arrest of Kyles. Asked if Beanie was paid any sort of reward for this information Dillman acknowledged that he was paid $400, but said it

[11] The building at 2313 Dreiss housed four apartments, which used a common garbage area. Tr 101.

was to repay him for the purchase price of the automobile. Tr 94. When asked if Beanie was present at Kyles's house on Sunday, the night before the search was conducted, Dillman said he did not know. Tr 93. Dillman also denied knowing whether Beanie had changed the license plate on the victim's car; the plate itself, he said, had been stolen and had not been checked for fingerprints. Tr 95, 97-98.

Evidence established that the .32 revolver found behind the stove was the weapon used to murder Dye. Tr 108. The weapon, the purse and its contents, the pet food, and other papers found in the garbage outside the apartment were tested for fingerprints, but none were adequate for identification. Tr 135. Mrs. Dye's fingerprints could not be found on her purse and effects, nor on the cans of dog and cat food. Tr 98. Beanie's fingerprints were not compared to the partial prints lifted from the victim's handbag or car. Tr 97.

Kyles's fingerprint was found on a small 2" by 2" Schwegmann receipt on the passenger side floorboard of the victim's car.[10]

By spraying ninhydrin on the paper to lift prints, the police crime technician destroyed all writing on the paper, including the date. The prosecution's experts differed over whether this result should have been anticipated. Tr 131, 140.

Last to testify in the state's case in chief was the victim's husband, Robert Dye, who said that Mrs. Dye usually shopped for the week, and could be expected to have 6 to 10 bags of groceries; he said that they had two cats and a dog, and typically bought several brands of cat food.

2. The Defense Case

Kevin Black and Ronald Gorman, acquaintances of both Beanie and Kyles, said that they saw Beanie driving

[10] Kyles v. Whitley, 5 F.3d at 826 n.29. Tr 150.

the red car stolen from the victim on the afternoon of Thursday, September 20th, a few hours after the murder. Gorman said that Beanie offered to sell him the car for $200.00 on Thursday. The prosecutor asked Black on cross-examination whether he had any involvement in the crime.

Donald Powell was approached by Beanie on Friday the 21st, offering to sell him the victim's car for $300.00. He and Gorman were asked if they could have mistaken one man for the other; both said that Beanie and Kyles had similar facial features, but were different in height and weight. Tr 234-48.

Johnny Burnes told the jury he had seen Beanie with the car late the night of the 20th. Burnes watched as Beanie changed the license plate on the victim's car. Tr 260. Burnes also saw Beanie at Kyles's apartment Sunday night stooping by the stove and quickly rising when the witness came into the room. Burnes said there were a number of people at the apartment that night, socializing or sharing a meal. Tr 261-70. Carolyn Campbell and Cathora Brown testified that they attended the gathering at Kyles's, and verified that Beanie was there. Tr 291-318.

Curtis Kyles took the stand at his trial. He testified he had never seen the handbag found in the garbage. He said he had shopped at Schwegmann "thousands" of times. The cat and dog food found at the apartment were his purchases. The family had a dog which was usually kept in rural Mississippi. His son had a pet cat and fed stray cats, one grey cat in particular. This was confirmed by Cathora Brown, who testified that she had seen the puppy and witnessed Kyles's boy feeding his pet cat. Tr 308. Kyles stated that he had purchased several cans of dog and cat food because it was on sale; there was a "little sign" under the items showing the pet food to be 3 for something and 2 for something. Tr 341.

Kyles told the jury that he had seen Beanie driving the victim's red car on Thursday the 20th. On Friday, Beanie gave him a ride in the car to Schwegmann, where Kyles purchased some transmission fluid for his car at the

auto parts department. On Sunday, Beanie came to Kyles's apartment and offered to sell him a black .32 revolver. Kyles said he declined; at trial he produced a receipt for a different gun which he had legally purchased. Tr 323.

On cross Kyles was shown a crime scene photograph taken shortly after the homicide in which five cars are partially visible behind a police car. He was asked repeatedly if the car visible in the background was his car.[15] Kyles said it was not. Tr 346-47.

3. The State's Case in Rebuttal

The state recalled all four eyewitnesses and asked Beanie to enter the courtroom. Each witness testified that Beanie was not the murderer; each reaffirmed his or her identification of Kyles. The witnesses stated they had, by then, seen Kyles 3, 4, or 5 times in court. Tr 376-393. Schwegmann's director of advertising, Edwin Arceneaux testified that neither Nine Lives cat food nor Kal Kan dog food were on sale the week of the murder, and the products would have been marked only with "the regular shelf price", which was 2 for .77 (cat food) and 3 for .89 (dog food). Tr 395. After argument and instruction, the jury returned a verdict of guilty of first degree homicide.

4. The Penalty Phase

The state re-introduced its case presented at the guilt or innocence phase, and presented no other evidence. Kyles's sisters, Leilah Trask and Brenda Hall, and brothers, Roosevelt and Thomas Kyles, spoke of Kyles's love for his children and his close relationship with his family. Defense counsel argued, and the state conceded, that Kyles had no criminal history.

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[15] The state theorized that the man who killed Dye had driven to Schwegmann in his own car; they argued that the photograph showed a car that looked like Kyles's.

Curtis Kyles again took the stand and said that he had not killed Delores Dye. Tr 438. After argument by the state and defense, the jury recommended a sentence of death.

Part II: *Information Revealed Only After Trial*

This section lists the information and documents withheld at trial and revealed to Kyles in state postconviction proceedings. In the Argument below, Kyles demonstrates how competent counsel would have used these and additional undisclosed facts.

1. *Beanie's conversation with Detectives Miller and Eaton*

The night that Beanie called the police to tell them he had the victim's car, he met with Det. John Miller. Miller wore a body microphone; the conversation between the two men, later joined by Det. Eaton, was taped and has been transcribed. JA 221.

Beanie began by telling the police that he called to speak with the officers because he had bought a car from Kyles for $400 that he subsequently learned might be the victim's stolen car. He stated that Kyles sold him the car on Friday, about 6:00 pm, and that he brought Kyles back to Schwegmann on Friday night around 9:00 to pick up Kyles's car. JA 222. Beanie stated that Kyles took a brown pocketbook out of the bushes at Schwegmann. He said that Kyles had a "bush" hairstyle. Beanie stated that Kyles did not give him the title to the car, but that Kyles said he would bring it to him on Sunday.

On the tape Beanie recommends that the police search Kyles's garbage for the victim's purse. JA 257. At the postconviction hearing, the prosecutor conceded that he would have informed the defense that the search of Kyles's garbage was Beanie's idea, had he been aware of it at trial. H 2/20 148.

On the tape Det. Miller asks Beanie about the murder weapon. Beanie says "If you set [Kyles] up good, you can

get that same gun." JA 229. Beanie also tells the police several times that he wants money for informing on Kyles. "I ain't doing all of this for nothing, you know." JA 246.

A number of times Beanie expresses the fear that he might be a suspect in the murder since he had been seen in the victim's stolen car. "I betcha I can get in a lot of trouble for this shit," he says.[16] JA 228. He also reveals a knowledge of the crime: Asked where Kyles's car was parked in the lots surrounding the supermarket, Beanie replies, "On the same side where the woman was killed at."[17] JA 231. After expressing these concerns, Beanie states that he had been driving the car around the French Quarter.

Based on these conversations, the police knew that Beanie changed the license plate on the victim's car. As can be heard on the tape, the police call the dispatcher to have a check run on the license plate number. The dispatcher states the plate belongs to a stolen car. JA 241.

2. *Beanie's signed statement*

After the taped conversation, Beanie went to police headquarters, was interviewed, and signed a typed statement inculpating Kyles. JA 214. Beanie said that, after buying the red car from Kyles on Friday, he helped Kyles move groceries and a woman's handbag from the victim's car into the trunk of Kyles's car, then followed him from

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[16] Beanie's repeated expressions of concern on this point are the critical context for evaluating the police officer's numerous requests for information. "Am I going to get put in jail?" JA 235. "I coulda been charged with that [murder]." JA 246. Det. Miller combines reassurances ("You did the right thing") with inquiries about the missing evidence, the murder weapon, and Kyles's past.

[17] At the postconviction hearing, the prosecutor said it "never occurred" to him to ask how Beanie knew this. H 2/20 130.

Mazant Street back to the Desire Street apartment where he helped unload Kyles's car. But he also said that he gave Kyles a ride to the Schwegmann parking lot where Kyles picked up his car much later that same Friday evening. JA 218. Prosecutor Strider admitted, at the post-conviction hearing, that this inconsistency might have been helpful to the defense and "would certainly not be beneficial" to the state. H 2/20 133.

3. *Beanie's interview with the prosecutor*

Prosecutor Cliff Strider testified at postconviction proceedings that he did not interview Beanie until after the first trial because

> I didn't think he was important to the case before we tried the case the first time. That trial resulted in a hung jury. At that time I requested the Homicide Department to locate Mr. Wallace so I could interview him.

H 2/20 101-02. Strider took notes during the interview. JA 258-63. In the interview, Beanie admitted changing the license plate. JA 261. He also discussed his visits to Kyles's apartment on Sunday, the evening before Kyles was arrested, and the evening on which Burnes testified he saw Beanie stooping near the stove. Tr 263. Beanie told the prosecutor he went to Kyles's apartment twice on Sunday; when he left the second time, it was to meet again with Det. Miller. JA 262. At trial, Det. Dillman testified that he "ha[d] no idea if" Beanie was at Kyles's house on Sunday night. R vol II 93.

According to the notes, Beanie helped Kyles retrieve his car from the Schwegmann lot on Thursday evening at 7:30. JA 258. He further stated that he bought the victim's car from Kyles on Friday morning at 11:00. JA 259.

Beanie also stated that Kevin Black was a participant in the unloading of the victim's possessions from her

stolen car. Black does not figure at all in the first two versions of Beanie's story.[18]

The notes also reveal that Beanie said that after he "bought" the victim's car, he "pulled out – hit fence – scratched on passenger side (rear)". JA 260. The only other reference in the record of minor damage to the victim's car is from an unrelated witness, as explained below.

4. *The police computer print-out of license plates*

The police theorized that whoever committed the murder drove to Schwegmann in his own car, which he necessarily left there when he stole Dye's automobile. At trial the state confronted Kyles with a magnified photograph of the crime scene, taken within hours of the murder. In the background the roof of a car is visible; the prosecutor argued it was Kyles's. Tr 347.

A New Orleans Police Department Interoffice memo to Det. Dillman from three other detectives, concerning the Dye homicide, reads as follows:

> John,
>
> Attached you will find a print out of vehicles which were parked in the parking lots around Schweggmans [sic] on 9-20-84 at 9:15pm.

D-7. The four-page computer print-out lists the license plates, followed by the names and addresses of registrants. Kyles's name is not on the list.

5. *The eyewitnesses' initial statements*

Territo, Henry Williams, Jones, Edward Williams and Smallwood signed typed statements, describing the events they witnessed on September 20th and the man

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[18] Black testified at the first trial that he saw Beanie in the victim's car the day of the murder; Black was inculpated for the first time in Beanie's between-trial interview.

they saw. Trial counsel asked in his pretrial motion for particulars for any descriptions by witnesses. R vol I 117-8. The state responded that the defense was not entitled to witness statements under *Brady v. Maryland*, 373 U.S. 83 (1963). The statements were not disclosed to Kyles until postconviction.

The statements diverged on a number of descriptors. Heights ranged from 5'4" to 6'; age from 17 to 28 years old; hair from shoulder length to short. Smallwood saw a mustache, no one else saw facial hair. Every observer who remembered the man's hair said it was plaited, worn in braids. *See* App. C for a detailed account.

The eyewitnesses disagreed on what they saw as well. Plick did not see what object occasioned the struggle between the victim and the man; Edward Williams thought it was a purse, and Territo described a purse with a strap; Jones said the victim's purse had been locked in the trunk and the two fought briefly over her keys. Isaac Smallwood's initial statement and his trial testimony varied greatly; he initially told the police that he had not seen the murder, but at trial he described the crime as if he had witnessed it. *See* 34-37, *infra*.

Trial counsel asked questions about the substance of the initial statements during the pretrial hearing on suppression of the identifications. R vol II 7-8. Det. Dillman's responses characterizing the physical descriptions are compared to the actual statements given by the witnesses at 40-41, *infra*.

6. *Police report about the Crozat Street accident*

The evening of the homicide a man came to the police to report seeing a car resembling the victim's car on Crozat Street, near the French Quarter of New Orleans. The undisclosed report, entitled "Homicide at 5300 Gentilly Road," was routed to Det. Dillman. The citizen who came forward said he saw the car swerve onto a sidewalk, striking a parking meter. The citizen

twenty-eight years. Also, Smallwood's written statement claims the perpetrator had a light mustache and his braids went to his shoulders.[15] However, there is no reason to believe that Dillman's testimony did not represent his good faith recollection at the time, and he was not far off the mark. The discrepancies in the written statements of the eyewitnesses are within an expected range. The age, height, and weight discrepancies in the written statements do not contradict the testimony of the eyewitnesses in court and do not suggest that Beanie may have been the perpetrator. It must be recognized that had Dillman's estimates been more accurate Kyles might have inquired into these discrepancies at trial, slight as they were. These written statements would have been of very limited value, if any, to Kyles. The State submits that existence of the minor discrepancies in these statements is exactly what the Court had in mind when it held in *Bagley* that exculpatory evidence must not only be favorable, but also material, before the state must provide it to the defense.[16] The statements did not constitute material exculpatory evidence.

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[15] J.A. 189. Smallwood's written statement also contains a claim that he did not see the incident before the shot was fired. This is treated in the next part of this argument.

[16] *United States v. Bagley*, 105 S.Ct. 3375, 3380 n. 7 (plurality opinion): " . . . [A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments."

b. Isaac Smallwood's Testimony

Shortly after the murder Isaac Smallwood gave the police a written statement in which he stated that he was standing near the gas pumps on the Schwegmann parking lot when he heard a loud pop. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." J.A. 188-190. He stated that he did not see a weapon, that the car passed near him, and he thought he could identify the person driving the car.

Smallwood's testimony at Kyles's first trial was consistent with his written statement to police shortly after the murder. Smallwood testified during the first trial that he heard the shot and when he looked in the direction from which the shot came the lady was already on the ground.[17]

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[17] At Kyles' first trial, on November 26, 1984, the prosecutor asked Mr. Smallwood what he saw, to which Smallwood responded:

> A. Yes, me and my co-workers, we were standing by until my foreman come back from Schwegmann's from using the telephone, and see I had my back turned to the Chef [highway], and that's when *I heard something went off*; that's when my podnah, Henry [Williams], he said "a woman over there got shot," *so I looked over there towards the lady laying on the ground*, and the guy got up into this woman's car and passed me by in the lot.
>
> - - - - -
>
> Q. *When you looked over there*, what was that individual doing? The lady – *was the lady already on the ground?*
>
> A. *Yes.*
>
> Q. And what was the individual who drove the car, what was he doing?

At the second trial, however, Smallwood testified that he saw the whole incident, including the shooting itself. Nevertheless, Regan, defense counsel at both the first and second trial, was present and heard Smallwood's testimony. Therefore, Regan was, or should have been, aware of Smallwood's testimony regarding the sequence of events. Apparently Regan did not conclude that the discrepancy was worth examining on cross-examination, or perhaps did not even notice the discrepancy because it pertained to a fact which was not questioned at the trial – that the same man who drove Mrs. Dye's car off the parking lot had also shot her.

Kyles now claims that the state should have provided Smallwood's written statement, because that statement partially contradicts his testimony at the second trial. Kyles fails to point out that Smallwood's testimony at the first trial also contradicts his testimony at the second trial, and Regan was present at both to recognize the discrepancy himself. Thus, Smallwood's written statement would not point out any discrepancy which should not have already been apparent on the face of Smallwood's trial testimony. Neither Kyles's defense counsel nor the prosecutors paid attention to the difference in

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A. He just got in the car like it was his own car, and eased over, I guess going on about his own business.

Tr. Trans., State v. Curtis Kyles, Criminal District Court, No. 304-163, testimony of Isaac Smallwood at trial on the merits, 11-26-84, p. 50, 51.

At the hearing on Kyles's postconviction application for habeas corpus relief, during the testimony given by his trial attorney, Martin Regan, the judge took judicial notice of the testimony at the first and second trials. Hearing, 2-20-89, testimony of Martin Regan, p. 5.

testimony between the first trial, which was consistent with the statement, and the testimony at the second trial. The difference was inconsequential.

The Fifth Circuit majority, treating this discrepancy, stated:

> Kyles overlooks, however, that Smallwood consistently stated that the gunman then drove the LTD close by him. Smallwood always maintained that he got a good look at the killer then, and like Williams, immediately recognized Kyles in the photographic lineup. Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others.
>
> J.A. 55

B. ALL PHYSICAL EVIDENCE PRODUCED BY THE STATE AT THE TRIAL IMPLICATED KYLES AS MRS. DYE'S MURDERER.

Additional supporting evidence offered by the state during the guilt phase of the trial included: (1) a Schwegmann's sales slip found in Mrs. Dye's automobile which contained two of Kyles's fingerprints; (2) the murder weapon (.32 cal. pistol) found in Kyles' residence behind a kitchen stove; (3) Mrs. Dye's purse, personal papers, and credit cards, found in a trash bag outside Kyles' residence; and (4) Schwegmann's shopping bags seized from Kyles' kitchen, along with cans of the same brands of pet food often purchased by Mrs. Dye.

II.

KYLES HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

Kyles initially claimed that his trial counsel, Martin Regan, was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). He did not pursue this argument in his brief to this Court, although effective performance of trial counsel is one of the issues approved by the Court for review. The Court of Appeals considered only the claim that counsel was ineffective because he did not interview Beanie and call him to the witness stand at trial as a defense witness. This limited claim is treated here because the dissent in the Court of Appeals decision addressed the issue at some length. J.A. 93-97, 108-109.

Martin Regan represented Kyles at trial. Regan is a respected New Orleans attorney who, at the time of Kyles's trial, had tried over one hundred jury trials and participated in at least three capital trials. H 2-20-89, p. 2. Judge Waldron, who presided over the trial and the state postconviction hearing, concluded that "Mr. Regan provided the defendant with a vigorous, dedicated and more than adequate defense."[18]

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[18] Judgment, J.A. 31. Judge Waldron continued, "As he always has been, in the many cases he has tried before this Court, Mr. Regan was a tenacious advocate on behalf of his client. His reputation as an attorney who is always prepared for, familiar with his case, and professional in his presentation remains intact despite the outcome of this particular case." J.A. 31-32.

Regan testified at the postconviction hearing that he did not call Beanie as a witness at the trial because he erroneously thought that under Louisiana law Beanie must be hostile and his testimony must be surprising before Beanie could be cross-examined. The State submits that Regan's decision, even if based upon an erroneous understanding of the law, was proper and Kyles suffered no prejudice from the decision.

If Regan had called Beanie as a witness the likelihood is that Beanie would have refused to testify and invoked a "blanket" Fifth Amendment privilege.[19] Under Louisiana procedure the determination as to Beanie's right to assert his Fifth Amendment privilege would have been made outside the jury's presence and the invocation by Beanie would not, as the dissent suggests, "have presented Kyles with valuable ammunition supporting the theory of the defense." J.A. 108. *State v. Berry*, 324 So.2d 822, 829-830 (La. 1975). Indeed, in Louisiana it is improper conduct for either the prosecution or the defense knowingly to call a witness who will claim a privilege, for the purpose of impressing upon the jury the

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[19] As Judge King pointed out in her dissent, "[t]he entire purpose of calling Wallace [Beanie] would have been to expose his leading role in the development of the prosecution's case, to impeach him and, in the process, to accuse him of framing Kyles and suggest that Wallace had some role in the murder." J.A. 97. However, Judge King was incorrect in concluding that there was a "serious question" as to whether Beanie could have taken a "blanket" Fifth Amendment privilege as to all questions asked. Under Louisiana law Beanie had the right to assert such a blanket privilege, since the evidence introduced by the defense implied that he was the perpetrator. *State v. Savoy*, 537 So.2d 246, 249-250 (La. App. 4 Cir. 1988).

fact of the claim of privilege. *State v. Berry, supra,* at. 830.[20] Once the defense called Beanie the trial court, which was aware of the defense tactic involved, surely would have advised Beanie of his rights and assigned counsel to advise him, as the court did with two other witnesses who appeared on behalf of Kyles.[21]

In the unlikely event that Beanie was called to the stand and did not invoke his Fifth Amendment privilege, he would have surely testified that, as he told police, he purchased Mrs. Dye's car from Kyles, he helped Kyles remove Mrs. Dye's groceries from her car, he took Kyles to Schwegmann's to retrieve his own car, and he knew Kyles carried a .32 cal. pistol. This evidence was not presented by the State, although some of it was brought out on cross-examination of other witnesses by the defense.

To Kyles, Beanie was at best a "loose cannon," as the Court of Appeals majority noted. J.A. 70. Regan could have cross-examined, but his cross-examination would,

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[20] The Louisiana Supreme Court cites as authority for its conclusion the American Bar Association Standards of Criminal Justice, Relating to the Prosecution Function, Standard 5.7(c), and Relating to the Defense Function, Standard 7.6(c) (1971). *Id.*, p. 830.

[21] The trial court appointed an attorney to advise defense witnesses Kevin Black and Johnny Burnes regarding their right to assert their Fifth Amendment privilege, once it became apparent that they may have been accessories after the fact to the murder. R. vol. 2, pps. 194-202. This was done outside the presence of the jury and the procedure was approved in this case by the Louisiana Supreme Court. *State v. Kyles*, 513 So.2d 265, 271-272 (La. 1987), J.A. 12-14.

under Louisiana law at the time, have been limited to impeachment, and, even then, "the impeachment must be limited to evidence of prior contradictory statements." La. R.S. 15:487; see J.A. 32. Contrary to the argument of the dissent below, the limitation of Beanie's cross-examination to impeachment would have prevented or at least drastically limited exploration by Kyles of his claim that Beanie was the murderer. It would also have prevented exploration of other aspects of Beanie's life, such as his prior arrests or possible involvement in crimes other than the murder of Mrs. Dye.

Martin Regan made the correct decision when he decided not to call Beanie as a witness at trial.[22]

III. THE STATE DID NOT FAIL TO DISCLOSE FAVORABLE MATERIAL EVIDENCE, AND DID NOT PRESENT FALSE EVIDENCE AT TRIAL.

The State emphatically denies Kyles's claim that the prosecutors and the police in Kyles's case suppressed information which was favorable and material to Kyles's defense, and used "false" evidence at his trial. The record simply does not support Kyles's charges. An examination of these claims shows that the police and prosecutors acted in good faith in preparing and presenting an overwhelming case against Kyles, and the items possessed by the police about which Kyles now complains did not constitute material exculpatory evidence.

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[22] The Court of Appeals majority treats *Strickland* at J.A. 69-73.

While Kyles has made many claims, they are all without substance. As the federal district court commented while considering Kyles's claims below, "Twenty times zero is still zero." J.A. 180.

A. THE STATE WAS NOT BOUND TO SUPPLY EVIDENCE OF BEANIE'S CHARACTER OR CREDIBILITY.

The Court of Appeals majority noted the fact that the State neither called Beanie as a witness nor informed the jury of the contents of his initial tip to police.[23] As that majority stated, "[p]rosecution witnesses did not mention Beanie by name except in response to the cross-examination by [defense attorney Martin] Regan." J.A. 69. Thus, the State did not recommend Beanie's character or credibility to the jury, and, because neither party called Beanie as a witness, his character and credibility were not issues at the trial. The State did not even claim that Beanie was an innocent purchaser of Mrs. Dye's vehicle,[24] and did not propose a theory of the case to the jury in which Beanie played a part. Beanie "made our case," as prosecutor Strider testified, by providing Kyles's name to police, thus enabling them to conduct photographic lineups with the witnesses which included Kyles's picture.[25]

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[23] Opinion of the Fifth Circuit Court of Appeals, at J.A. 58.

[24] The Fifth Circuit majority noted that the " . . . state never urged and no prosecution witness ever stated that Beanie was an innocent buyer." J.A. 58.

[25] H 2-20-89, testimony of Cliff Strider, p. 116-117. United States District Court Judge Arceneaux stated: "Beanie's testimony and good character were not an issue. Beanie supplied a name. That is virtually all he did." J.A. 169.

However, the State was not obligated to provide evidence of his character, his credibility, or his lack of credibility.

B. THE STATE DID NOT SUPPRESS ANY FAVORABLE MATERIAL EVIDENCE WHICH SHOWED EITHER THAT BEANIE FRAMED KYLES OR MURDERED MRS. DYE.

Kyles claims that the record contains a strong inference that Beanie had a deal with the State for favorable treatment in exchange for information,[26] and implies that the State covered up Beanie's acts in framing Kyles. The record does not support this allegation.

Kyles was convicted of first degree murder less than three months after his arrest. During this brief period the prosecutors, Cliff Strider and Jim Williams, prepared their case for trial by interviewing the homicide detectives assigned to the case, particularly the case officer, Det. Dillman, and homicide Det. John Miller. The prosecutors also interviewed the witnesses to the shooting and had access to some of the police "dailies." They did not receive the police homicide report until after Kyles was tried and convicted.[27]

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[26] Petitioner's brief, p. 35.

[27] The homicide report in this case was forwarded to the District Attorney's office on December 10, 1984, two days after the trial had been completed. Testimony of Cliff Strider, H 2-20-89, p. 102-103, 107-108; testimony of Det. Robert Kessel, H 3-3-89, p. 25.

The police never considered Beanie a suspect in the Dye murder.[28] After the first trial, when Kyles introduced his defense that Beanie had perpetrated the murder, prosecutor Cliff Strider interviewed Beanie for the first time and satisfied himself that Beanie was not the murderer.[29] Beanie was clearly an unsavory character, an informant whom Det. Miller believed to be "a con-man, drug user at times, [and] thief,"[30] a man who was well acquainted with Kyles and his friends,[31] but who was not Mrs. Dye's murderer.

Since the police and prosecutors did not consider Beanie to be the murderer, they did not view their relations with him or his activities to be favorable material evidence which Kyles could use in his own defense. Kyles's complaints regarding evidence the police possessed about Beanie are as follows:

1. The Tape of Beanie's Meeting with Det. Miller on Saturday, September 22, 1984.

The Saturday evening meeting between Det. John Miller and Beanie was their first time to meet in person.[32] Sgt. Eaton placed a microphone on Det. Miller before Miller went to the meeting because he was not sure what

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[28] H 2-24-89, testimony of Det. John Miller, p. 22; testimony of Det. John Dillman, H 2-24-89, p. 71.

[29] H 2-20-89, p. 141.

[30] H 2-24-89, testimony of Det. John Miller, p. 22.

[31] *Id.*, p. 24.

[32] H 2-24-89, p. 2, testimony of Det. Miller.

Beanie had in mind and wanted to protect Miller.[33] The tape was not brought to the district attorney's office until after the trial and was not seen by prosecutors before trial.[34] Det. Dillman did not listen to the tape because police had obtained Beanie's written statement.[35]

Petitioner claims that five parts of the tape contain exculpatory material:

a. The tape shows that Beanie knew where the murder occurred.

Beanie brought Det. Miller and Sgt. Eaton to the location on Schwegmann's parking lot where Beanie claimed Curtis Kyles' automobile was located when he and Kyles retrieved the automobile. Beanie pointed out that was the "same side where the woman was killed at." J.A. 231. He told police that he followed news accounts of the murder, which contained photographic information showing where the shooting occurred.[36] Petitioner argues that Beanie's knowledge of where the murder occurred indicated information which only the perpetrator would know. This conclusion is incorrect.

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[33] Testimony of Det. John Miller, H 2-24-89, p. 26; testimony of Sgt. James Eaton, H 3-3-89, pps. 58-59.

[34] H 3-1-89, pps. 5-6, testimony of assistant district attorney Jim Williams; H 2-20-89, pps. 103-108, 110, testimony of assistant district attorney Cliff Strider.

[35] H 2-24-89, pps. 58-59, testimony of Det. John Dillman.

[36] "I picked up on it when I seen the news and I seen it in the parking lot, and the car was right there." J.A. 229.

Photographs of the murder scene were in New Orleans newspapers and filled New Orleans television, and Beanie carefully followed both. J.A. 247. Prosecutor Cliff Strider concluded in postconviction testimony that everyone who lived in the area knew where the murder occurred.[37] This statement on the tape would have been of no value to Kyles at trial.

b. Beanie made a remark on the tape regarding Kyles's hairstyle.

On the tape Det. Miller asked Beanie about Kyles' hairstyle, which Beanie described as "bushy." J.A. 249. Det. Miller asked Beanie: "Does he ever wear it in plaits?," to which Beanie answered "Uh-huh." *Id.* That is, Beanie signified that Kyles did sometimes wear plaits, the hair style used by the perpetrator at the time of the murder, but Kyles had a bush on "that day," referring to the day after the Dye murder, when Kyles sold him the car. Kyles would have been unlikely to have kept the plaits after a parking lot full of people saw him murder Delores Dye. It is not surprising that the following day he was wearing a bush style hairdo, and the police properly

[37] H 2-20-89, testimony of Cliff Strider, p. 130: " . . . it was on the T.V., it was on the radio, it was in the newspaper, and I think it was the talk of the town. I mean everybody knew where that occurred. I was in another trial and I knew." Even when the murder first occurred, Strider knew the precise location of the murder: "Near where the old pumps used to be." *Id.* Det. John Miller also emphasized that the case was "played up" on television and in the newspapers. H 2-24-89, p. 15.

attached no significance to the matter.[38] Indeed, if Beanie had been trying to frame Kyles he should have claimed that Kyles wore plaits.

c. Beanie requested on the tape to be reimbursed for the price he had paid for the automobile.

There was never any question that Beanie received money from the police. Det. Dillman acknowledged at the trial, in the presence of the jury, that Beanie was repaid the money ($400.00), he allegedly lost on the car.[39] Det. Miller checked the records during postconviction proceedings and determined that police had paid Beanie a total of $600.00, and this fact was reported to the court.[40]

d. Beanie suggested on the tape that Kyles might put incriminating evidence in his garbage.

Beanie suggested to Sgt. Eaton and Det. Miller that Kyles' garbage "goes out tomorrow" and said "if he's

[38] Det. John Miller correctly noted in his postconviction testimony: "Well, if I committed a crime and I looked one way, I would do something to alter my appearance, to try and change my identity or the possibility of somebody identifying me." H 2-24-89, p. 50. Miller also testified that there is "nothing difficult at all" about changing a hair style from plaits to a bush. *Id.* It should also be noted that a police photograph taken on June 6, 1984 shows that Beanie was wearing a Jherri curl, not plaits, fifteen weeks before the murder. J.A. 53.

[39] Trial transcript, vol 2 p. 94.

[40] H 2-24-89, p. 20.

account of how he came to be in possession of the murdered woman's car and their willingness to play into Beanie's hands. These include Beanie's criminal history and contemporaneous criminal charges.

Beanie came to the police an experienced informant.[31] He had an arrest for first degree murder in 1980, which had resulted in a plea of guilty as an accessory to murder and a two-year prison term.[32] H 2/20 98, D-6. He had open charges, for felony theft and possession of stolen property, offenses which occurred in June of 1984, three months before the Dye homicide *at the same location*, the Schwegmann supermarket. D-6. At the postconviction hearing, prosecutor Williams admitted that certain informants are given some latitude in their own behavior in exchange for information they might provide, stating, "I can't tell you specifically, [in this case] but I know it's a fact. There's no question.". H 3/1 27-28. The postconviction record contains strong evidence to compel the inference that Beanie had a deal with the state for favorable treatment in exchange for information. Beanie's responsibility for another murder was not confirmed until his own statement of December 12, 1984, D-9, but substantial evidence had been gathered before Kyles's second trial. An anonymous caller reported seeing Beanie trying to

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[31] His initial call was routed to Det. Miller because Miller had dealt with him in the past. H 2/24 2-3. Both Det. Eaton, who accompanied Miller during the first contact with Beanie, and Det. Dillman claimed no knowledge of Beanie's informant status. H 3/3 58; H 2/24 64. Williams, the prosecutor, testified, however "I knew he was an informant." H 3/1 19.

[32] Dillman admitted being aware of Beanie's lengthy arrest record, but saw no implications for his credibility as a source of information. H 2/24 71. Compare this opinion to Det. Ray Miller's statement that defense witness Gorman's information could not be believed because of Gorman's record. H 3/3 42.

sell silver objects stolen in the burglary/murder.[33] Burnes and Gorman had sworn that Beanie confessed the murder to them. Madison Marshall also told the police he had overheard this admission. D-12. Beanie's former girlfriend Valerie Brown had implicated him in several offenses, including forging the murder victim's checks; Beanie was positively identified as the forger by the store owner who cashed the checks. D-12. Beanie was arrested for three counts of forgery, arrested the hour that Kyles's jury retired to deliberate his sentence. Incident Report, D-12 Item # L-8299-84.

The three counts of forgery were eventually refused for "insufficient evidence". D-6. *Beanie was never charged with Patricia Leidenheimer's murder.* This preferential treatment is so astounding it can only be understood as the state protecting its "victory" in petitioner's case. It is not difficult to speculate about the effect on a jury had they been told that there was substantial evidence that Beanie had shot a middle-aged woman in the face nine months before another helpless woman was shot in the temple.

4. The Suppressed Evidence Would Have Supported The Defense Witnesses

Knowledge of Beanie's presence at Kyles's apartment on Sunday night would have greatly strengthened Burnes's credibility. Burnes told the jury he had seen Beanie stooping by the stove where the gun was found. JA 263.

Burnes' credibility could have been further corroborated by Beanie's admission that he changed the license plate. Burnes testified at trial that he saw Beanie take a license plate off "an old car by the tracks" and put it on the victim's car. Tr 260. The police dispatcher can be heard on the taped statement telling Det. Miller that the

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[33] This report, by a man who identified himself as a former employee of the New Orleans Police Department, was received on September 11, 1984.

plate is registered to a car reported stolen. JA 241. Burnes is the only witness who is right that the car is stolen. Det. Dillman tells the jury that it was the plate itself that was stolen. Tr 260, 206.

The state theorized that Kyles parked his car at Schwegmann and drove off in the victim's car. Kyles took the stand in his own defense and testified that Beanie gave him a ride to Schwegmann on Friday in the victim's car.[34] Kyles denied being at Schwegmann on Thursday. Kyles was confronted at trial with a magnified photograph of the crime scene: in the background is visible a portion of a car the prosecutor argued was Kyles's. Tr 347.

The evening of the murder the police listed the license plates of cars in the vicinity of the supermarket, and ran a computer check on them. D-7. Det. Miller equivocated at the postconviction hearing, stating that the police might have failed to get "all" the license plates. "[I]t was a very large parking lot, there were many cars. . . ." H 2/24 11-12. Accompanying the computer list is a "Police Interoffice" memo referencing the list of "vehicles which were parked in the parking lots around Schweggmanns on 9-20-84 at 9:15pm." D-7. The store closed at 9:00. D-23. Kyles's license was not on the list. The jury was entitled to decide whether or not the computer print-out deflected the state's attempt to imply that Kyles's car was in the photograph.

Beanie admits driving the victim's car around New Orleans and in the French Quarter in the suppressed statements. Defense witnesses Powell, Gorman, Black and Kyles himself all testified that they saw Beanie driving the victim's car. More importantly, the suppressed information from prosecutor Strider's interview of Beanie provides valuable insight into the state's attempt to impeach

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[34] The purpose of the lift was to purchase a can of transmission fluid and cigarettes from Schwegmann, not to retrieve his car from the lot after hours, as Beanie told the state.

Black. On cross-examination, the state insinuated that Black had participated in the loading and unloading of the victim's possessions.[35]

After the first trial ended in a hung jury, Beanie became important to the state, and Kevin Black became important to Beanie. Prosecutor Strider decided to interview Beanie after the trial and his handwritten notes of his interview with Beanie tell a story that differs remarkably about Black's role. Black's name was never previously mentioned by Beanie; it is on every page but one in Strider's notes. JA 258. According to the story Beanie told Strider, Black was one of the people who helped load and unload many bags of groceries, and a baby toilet and a lady's handbag from the red car. In fact, Beanie said that he bought the car, not on Mazant Street with the unknown Ricky present, as he had said in his earlier statements, but at Black's apartment.

The suppression of this alteration in Beanie's stories must be considered in context: the interview took place between the two trials. At the first trial Black, a citizen with no criminal record, testified as he did at the second trial, that he had seen Beanie in the victim's car on Thursday night. Between the two trials Beanie adjusted his story to implicate Black. The patent attempt to discredit a defense witness with a fabricated story should have been disclosed to the defense. Instead, the state used Beanie's invention to formulate a series of confusing and improperly suggestive hypothets and

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[35] Trial counsel Regan said that Black's testimony was substantively the same in the second as in the first trial, although his demeanor was drastically altered for the worse by the state's improper threats of prosecution. H 2/20 34. *See* Argument II B, *infra*.

asked them of Kevin Black on cross.[36] When he said "No" to them all, Strider threatened him with a perjury prosecution.[37] Tr 217.

5. The Suppressed Evidence Was Relevant To The Credibility Of The State's Witnesses

Smallwood was a strong witness for the state, and was not impeached. Cross-examination was just over 20 lines of transcript. Counsel was only able to bring out the fact that Smallwood never did see the assailant's full face, only a side view. Tr 49. As shown below, counsel would have devastated Smallwood's credibility on cross-examination had Smallwood's statement, given shortly after the crime, been disclosed. *See McDowell v. Dixon*, 858 F.2d 945, 949 (CA4 1988) (holding that inconsistent initial statement "would have weakened the victim's credibility, as well as the accuracy of [the] identification").

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[36] *See United States v. Robinson*, 8 F.3d 398, 413 (CA7 1993) ("A prosecutor may not ask a question 'which implies a factual predicate which the examiner knows he cannot support by evidence.' ") (citation omitted).

[37] Two other defense witnesses, Gorman and Burnes, were also threatened. Beanie threatened to kill them after they testified at the first trial. D-13, D-16. From a self-confessed murderer, such threats are not to be taken lightly. Nevertheless, the record is devoid of the state taking any action whatsoever after both the prosecutors and the police were informed of the threats to witnesses.

Initial Statement	Trial Testimony
I heard a lound pop. When I looked around I saw a lady laying on the ground, and there was a red car coming toward me.	A: Well, me and my partner was standing by the gas pump in Schwegmann's parking lot. My partner seen this guy was wrestling with this lady. We thought they was just playing with one another, thought they know one another. So the guy, he snatched her hand. When he snatched her hand, she wouldn't release her keys from her hand, so he just went up in his pocket and shot her in the head. Q: He shot her? A: Yeah he shot her.
Q: When you heard the shot, and looked toward the lady on the ground, was the black man standing near her? A: No. He was already in the car coming toward me.	Q: . . . After he shot her what did he do? A: He just let her fall on the ground. He walked toward the driver's side and then put the keys in the car and just eased off.
Q: Did you at any time see a weapon? A: No.	Q: Did you see a gun? A: Well, it was like a small .32, a small black gun. Q: Did you see where he took it from? A: He took it out of his right pocket.

Q: Do you know what type of vehicle it was he was driving? A: It was a red thunderbird. Maybe a 78 or 79.	Q: What kind of car was this? It was a red LTD.
When I looked around I saw a lady laying on the ground.	Q: Did you see her fall? A: Yeah.
The car then turned right on Chef Hwy, and he stopped for the red light, then he started to make a right turn but there was cars backed up so he backed up and went over the bridge.	. . . He got to the intersection of Chef. . . . He got down and took another right on France

JA 189-90 (sic passim). Tr. 41-44 (sic passim).

Smallwood's testimony is irreconcilably inconsistent with the statement he gave moments after the crime. Smallwood's prior statement most assuredly would have cast grave doubt on his credibility. Was he being honest at trial? Was he mistaken about what he witnessed when he was interviewed by the police at the crime scene? The answers matter little. What matters is that the triers of fact were completely unaware that Smallwood's trial testimony was radically different from his statement. It is the province of the finders of fact to assess the credibility of a witness. By hiding the statement, the prosecution prevented the jury from performing this primary function, and successfully prevented Kyles from subjecting the state's case to meaningful adversarial testing. The

statement would have been fuel for "the greatest legal engine."[38]

Examination of the six undisclosed eyewitness statements shows cogent grounds for impeachment of the accuracy and reliability of the state's eyewitnesses. These should have been disclosed to the defense. *See* Appendix C.

The statements diverged on virtually every descriptor. Henry Williams saw a man 5'4" tall, JA 197, but Territo said he was 6' tall. JA 194. Jones and Smallwood thought the man was 17 years old, JA 202, compared to Territo who said he was 28 years old. JA 194. All the witnesses saw braided or plaited hair, yet Smallwood saw "braids [that] looked like they went to his shoulders," JA 189, while Henry Williams saw "short" hair. JA 197. Smallwood was the only witness to see a mustache. JA 189.

Trial counsel asked for initial statements because even slight variations can make for instructive impeachment.[39]

That is the biggest lost opportunity for the defense. With each witness' statement compared to all other eyewitnesses' initial statements, Kyles could have demonstrated that even honest and well-meaning observers of sudden horrific violence differ about what they think they see. As Judge King noted in dissent below, "the effective impeachment of one eyewitness may have consequences that extend to another, unshaken eyewitness."

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[38] Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence § 1367 (Chadbourne Rev. 1974).

[39] "One of the most convincing ways of impeaching any witness is by confronting him or her with a prior inconsistent statement."

Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* (1989) at 143.

5 F.3d at 839.[40] *See also Lindsey v. King*, 769 F.2d at 1042-43, ("the destruction by cross-examination of the credibility of [an eyewitness] may have consequences . . . extending far beyond the discrediting" of that witness).

Particularly problematic is photographic selection: problems inhere in the process which are not intuitively apparent. Choosing a perpetrator from a photographic lineup is a "relative-judgment process" in which one selects the individual who best matches the perpetrator because there is a strong tendency for eyewitnesses to believe that the actual perpetrator is among the photographs. Wells, *What Do We Know About Eyewitness Identification?*, 48 Amer. Psychologist 553, 560 (1993). Studies have proven that "the information to which a witness is exposed after an event becomes integrated into the witnesses' memory of the event." Gorestein & Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. Applied Psychol. 616, 618 (1980). *See also* Loftus & Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 Law & Human Behavior 323 (1980). When a witness selects an incorrect face and that face is similar to the one originally viewed, "the new face will replace the memory of the old face." Gorestein & Ellsworth, *supra*, at 621.

Also significant here are the comments made to the witnesses after their selection at the photo lineup. "Whatever police might say to eyewitnesses soon after their identification decisions is likely to have effects that are

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[40] "[T]he vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Indeed, the single largest factor in wrongful convictions is eyewitness error. Wells, *What Do We Know About Eyewitness Identification?*, 48 Amer. Psychologist 553 (1993). Huff, Rattner, and Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinq. 518, 524 (1986). *See generally*, Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987).

resistant to subsequent influence." Loftus and Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. Applied Psychol. ___ (1994) (in press). Smallwood testified that the police told him he had picked out the person who had been arrested, and, "he had killed somebody else." R vol I 19. Robert Territo's choice was similarly confirmed; after he selected Kyles's photograph, the police told him "that's the one." R vol I 36.

Thus, the witnesses' subsequent in-court identification of Kyles instead of Beanie is far from persuasive, especially in light of the fact that the witnesses had seen Kyles four or five times in court after the photographic lineup, and the police had instantly reinforced their original selection by telling them they had chosen correctly.[41]

The witnesses selected the "next best" face from a group of photographs that did not include Beanie. Their choice was "approved" by authority: they then committed to that choice. The image of the picture, seen, at leisure, for some minutes, replaced the image of a murderer viewed for a few seconds when the witness was under the worst sort of stress. Every time the witnesses came to court they saw Kyles and became more committed to their "identification" of him.

B. The Prosecution's Use Of False Evidence Was Not Harmless Beyond A Reasonable Doubt

In *Agurs*, the Court restated the by-then well-established rule of *Mooney* and *Napue* that a conviction obtained by the introduction of evidence that the prosecution knows or should know to be false "must be set aside if there is any reasonable likelihood that the false evidence could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103. In *Bagley*, the Court reaffirmed this

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[41] Asked, "Are you absolutely sure this is the individual?" Henry Williams replied "With all I know, I'm sure." Tr 58.

standard and stated that the *Agurs* language is "a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 679.[42]

There is a reasonable likelihood that the state's presentation of evidence known to be false and evidence which created a false impression affected the jury's judgment in this case.

1. False Testimony In Pretrial Hearings

It was Beanie who first suggested that the police search Kyles's garbage for evidence. On tape, Det. Eaton quotes Beanie as saying "He said [Kyles's] garbage goes out tomorrow said if he's smart he'll put it in the garbage." JA 257. Both Miller and Eaton confirmed that it was indeed Beanie who first suggested that the garbage be checked. H 2/24 21; H 3/3 64.

Trial counsel thought to investigate the possibility that Beanie was behind the evidence found in the garbage. As the state acknowledged in postconviction proceedings, this was the first time to their knowledge that a suspect's garbage had ever been searched for evidence. H 2/24 21. At a pretrial suppression hearing, defense counsel explicitly asked if the police had a tip from an informant to search the garbage, and the officer said "No." R vol II 47.

During the suppression hearing, counsel cross-examined Det. Dillman about whether there were any inconsistencies in the witnesses' original statements, how many physical descriptions were given, how they differed, if there were any discrepancies in age or facial hair or the clothing worn, or any other descriptive variance. Dillman replied that there were only three physical descriptions,

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[42] *Accord Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (CA5 1993) (this standard is "considerably less onerous" than the *Bagley* test for suppressed evidence).

varying in height only, a matter of 3 or 4 inches; that the difference in estimated ages ran from twenty to twenty-eight, and that there was no disagreement about facial hair, clothing, or anything else. R vol II 7-8.

Not a single response of Dillman's was accurate. The state had six, not three descriptions; height was not the only discrepancy, and height ranged from 5'4" to 6', a difference of 8, not 3 or 4 inches. Smallwood said the man he saw was a teenager and had a moustache. There were also discrepancies about clothing. The fact that these deceptions occurred pretrial in no way diminishes the harm done the defense. The jury was entitled to know about the discrepant witness statements and who first suggested "Look in the garbage." The jury was entitled to the true answers to questions which were not asked because counsel was deceived before trial began. *United States v. Spagnoulo*, 960 F.2d 990, 995 (CA11 1992) (noting the importance of *Brady* disclosures for pretrial preparation); *accord Scurr v. Niccum*, 620 F.2d 186, 191 n.3 (CA8 1980).

2. Smallwood's False Testimony

When Isaac Smallwood took the stand, the prosecution was well-aware of his prior statement given at the scene of the murder. JA 188, 269. Yet the prosecution said absolutely nothing when his testimony began to differ greatly from his statement. R vol II 41-5. In fact, the prosecution elicited the false statements.

Most importantly, Smallwood testified that he saw the shooting, when the state knew that he had said precisely the opposite earlier. He changed his story, and the state helped him do it. The prosecutor asked Smallwood at trial, "And did you see him actually shoot her?" and Smallwood answered "Yeah." Tr 42.

Both prosecutors admitted they had read the witness statements before trial. H 2/20 122; H 3/1 7, 12, 16. Both prosecutors permitted Smallwood to testify falsely: they even recalled him in rebuttal to do it again. Tr 387.

3. The False Dispute About The Sunday Dinner

Det. Dillman testified that he "ha[d] no idea if" Beanie was at Kyles's house on Sunday night. Tr 93. This testimony, probably false,[43] came from the only police officer called to the stand who had anything to do with the investigation. Tr 62. The clear impression conveyed was that Beanie was nowhere near Kyles's residence on Sunday night, and thus not in a position to plant the murder weapon found there the next day.

Strider's notes of his between-trials interview with Beanie record the fact that they discussed Beanie's movements that Sunday in great detail. Strider noted that Beanie first went to the Kyles residence about 2:00 pm, left and came back about 7:00, and that he went from that residence to the police, "riding around" with Det. Miller. JA 262. The state should not have permitted the jury to infer that Beanie was not at Kyles's apartment the night before the search, knowing that inference was absolutely false.

4. The State Knew Beanie Was Paid $600

Dillman lied when he testified that Beanie was paid $400 by the police for his alleged purchase of the car. Tr 94. Dillman admitted to the prevarication in the postconviction hearing, stating that Beanie was paid $600.[44] H 2/24 19-20.

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[43] Beanie was primarily Det. Miller's informant; Miller testified he turned over his information on Beanie to Dillman, the Dye homicide investigator. H 2/24 2. Miller encouraged Beanie to see if he could get more evidence, JA 238, 242, 245, and Beanie met with Miller at 10:00 pm on Sunday night just after leaving Kyles's house. Beanie told him where he had been. H 2/24 31-32.

[44] Beanie also received $1000 from Crimestoppers. H 2/20 113; H 2/24 20. Considering that one witness testified that Beanie offered to sell him the car for $200, Beanie's pecuniary

This point was significant. At trial, the state maintained that Beanie received $400 from the police because, as a good faith purchaser, he should not have to suffer the loss of buying a stolen car. Tr 94. The defense theory that Beanie was a regularly paid informant who pointed the finger at Kyles in part for a profit could hardly be exploited with this false testimony. The defense, and more importantly, the fact finders were duped.

5. The False Evidence About The License Plate

Dillman also testified that he "ha[d] no knowledge of" Beanie changing the license plate on the Dye vehicle. R vol II 95. But Det. Miller certainly knew that Beanie was the one who changed the plate. JA 231, 239. And prosecutor Strider knew that Beanie changed the plate, because they discussed it in an interview only days before the second trial. JA 261. This information, which the jury was entitled to have, was important for two reasons. One, it seriously weakened the state's assertion that Beanie was an innocent buyer. Two, it corroborated Burnes's testimony that he saw Beanie take the plate from an old car "by the tracks," because the plate in fact was from a stolen car. Tr 260; JA 241.

The crucial importance of the facts that Beanie visited Kyles's residence, changed the plates, and was paid $600 for information (not $400 for an alleged loss), is that these facts support the defense theory. The defense witnesses offered testimony in an effort to show that Beanie planted the gun and the purse, and that he stole the car.[45] Prosecutor Strider sat silent while testimony that suggested the contrary and that Strider knew to be false went to the

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dealings with the police must have been highly satisfying. Tr 234.

[45] Corroboration of a witnesses' testimony can be critical to either party's case. Here it was crucial given the fact that two key witnesses were scared to death as a result of the prosecution's threats and appeared incredible. *See, infra* at II B.

finders of fact in a capital trial. There is a reasonable likelihood that the jury's judgment was affected by the false and misleading evidence. It is not possible to find otherwise on this record.

C. Kyles's Sentence Of Death Is Unreliable

In Louisiana, if one juror determines that a life sentence is appropriate, the death sentence cannot be rendered.[46] "[T]he proper frame of reference," therefore, "is whether the mind of one juror could have been changed." *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (CA5 1993).

After the trial court instructed the jury, the foreperson, apparently concerned about Kyles's possible release from prison, asked, "I know that the law says life without benefit of parole, probation or suspension of sentence. Can you tell me if that's exactly carried out?" R unnumbered vol, 12/8/84 penalty phase instructions at 5.[47]

The jury sentenced Kyles to death after finding that the murder was committed in the course of an armed robbery. R vol I 53. Kyles presented witnesses to show that he was a loving father who supported and cared for his children, he had close family relationships with his mother and siblings, and he lacked a significant criminal

[46] La.C.Cr.P. art. 905.6, *see, e.g., State v. Loyd*, 459 So.2d 498 (La. 1984).

[47] The court responded by stating, "You should not in any way ponder, deliberate, consider what possible ramifications, if any there are in connection with my imposing [either] sentence. . . . The law says that that is the only response I can give you." *Id.*

history.[48] Kyles took the stand and continued to maintain his innocence.

The Louisiana Supreme Court has held that it is appropriate for the capital sentencing jury and a reviewing court to consider the question of residual or lingering doubt. In *State v. Lee*, 524 So.2d 1176 (La. 1987) (on rehearing), the court held that the introduction of an inadmissible confession was harmful error in the sentencing phase. The court reasoned that because "one or more jurors might have retained minor trepidations about the nature" of the state's evidence, that "uncertainty, though not rising to the level of reasonable doubt regarding guilt, might have led such a juror to hold out for a life sentence." *Id.* at 1192. *See State v. Messiah*, 538 So.2d 175 (La. 1988) (it is appropriate for counsel to argue residual doubt regarding specific intent); *State ex rel. Burnham v. Blackburn*, 484 So.2d 656 (La. 1986) (even though a rational fact finder could have found that the murder was committed in the course of an armed robbery, the jury's verdict of life may have been the result of lingering doubts about whether armed robbery was committed).

States are free to permit capital sentencers to consider residual doubt. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). While *Franklin* held that a residual doubt instruction is not constitutionally mandated, the Court recognized that "residual doubts will inure to the defendant's benefit," *id.* at 173, and noted that Franklin's jury was free to consider them. *Id.* at 174, 175.

The majority below failed to consider the impact that residual doubt has in this case. This was error. The evidence suppressed by the state casts doubt on Kyles's identity as the murderer. In a capital case, the "petitioner should receive the benefit of the doubt" on the question

[48] The prosecution agreed that petitioner met the statutory mitigating circumstance found in La.C.Cr.P. art. 905.5(a) by stating in closing argument, "there's only one mitigating circumstance. . . . a lack of prior criminal activity." Tr unnumbered vol, 12/8/84 at 10.

of materiality. *Lindsey v. King*, 769 F.2d 1034, 1043 (CA5 1985). Louisiana law views residual doubt as a relevant issue for the jury's consideration in capital sentencing and a factor that must be considered by reviewing courts when assessing error. Given the effect of the withheld and false evidence in the guilt or innocence phase, it is probable that, one or more jurors, unswayed by these constitutional improprieties, would have harbored a doubt about guilt that would have inured to Kyles' benefit at sentencing. Such doubt undermines confidence in the reliability of the death sentence. *Bagley*, 473 U.S. at 683.

II. THE MAJORITY BELOW ERRED IN ITS ANALYSIS

A. The Majority's Analysis Of The Significance Of The Prosecution's Undisclosed Information Is Faulty

The majority opinion below errs by significantly understating the effect that the undisclosed evidence would have had on a reasonable juror, by substantially misunderstanding how a competent defense lawyer would have used the evidence, by significantly overestimating the impact of the state's case on a reasonable juror, and by failing to analyze how the suppressed evidence impacts on the death sentence. Moreover, the majority wholly fails to consider the prosecution's introduction of false evidence. The opinion mischaracterizes this case as one in which Kyles is "essentially ask[ing] th[e] court to reconsider the defensive theory rejected by the jury." *Kyles*, 5 F.3d at 807. Exactly the opposite is true: petitioner is asking the Court to give him a chance to convince a jury of his innocence on the basis of a wealth of previously misrepresented and suppressed evidence that was not before his original trier of fact.

The majority fails to consider the cumulative effect of the withheld information; the court views each suppressed item as separate and apart from each other. This

is wrong as a matter of law. "Certainly, the effect of each nondisclosure . . . might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial." *United States ex rel. Marzeno v. Gengler*, 574 F.2d 730, 736-37 (CA3 1978); *accord Chaney v. Brown*, 730 F.2d 1334, 1356 (CA10 1984) (all items of withheld evidence "must be viewed together for their cumulative effect"); *King v. Ponte*, 717 F.2d 635, 642 (CA1 1983) (court must "consider the cumulative effect of these suppressions rather than the effect of each statement on its own").

Each suppressed item has value to Kyles and each value is qualitatively different. The value of certain information is readily apparent, such as the fact that Beanie's suggestion prompted the New Orleans police to seize abandoned garbage for the first time. The value of Beanie's being arrested for theft three months prior to the murder is not so apparent; its significance increases when the site of the theft is identified as Schwegmann and when the incident is viewed in the light of all other information now known about Beanie. The majority below fails to assess how the defense could have used such information to demonstrate that the police investigation and its products were skewed by the unquestioned acceptance of Beanie's stories. It is only when all the suppressed facts are analyzed cumulatively that a proper analysis can be made. *See Kyles*, 5 F.3d at 831 (King, J., dissenting).

The majority's assessment that the evidence against Kyles was overwhelming is erroneous, in part because the court fails to make this assessment in light of the defense evidence. It is plainly wrong in "attach[ing] little significance" to the fact that the jury could not agree on a verdict at the first trial. *Id.* at 817 n.16.[49] A prior mistrial

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[49] The suggestion that the possibility that a "juror's concern about capital punishment" may have caused the mistrial ignores the obvious and is contrary to law. *Id.* 817 n.16. The jury

based upon a hung jury is an important consideration regarding *Brady* materiality. *Stano v. Dugger*, 901 F.2d 898 (CA11 1990) (en banc). Where, as here, the evidence against a defendant in a second trial is essentially the same as in the first, the "verdict is already of questionable validity, [thus] additional evidence of minor importance" justifies a new trial. *Agurs*, 427 U.S. at 113.

B. Other Prosecutorial Misconduct Should Have Been Included In Assessing Materiality

In assessing the materiality of the suppressed evidence, the Fifth Circuit majority also fails to take account of other egregious prosecutorial misconduct. Shortly before defense witnesses Burnes and Black were called to the stand, the prosecution told the court that it was "considering the possibility" of filing charges against them relating to the Dye murder, and requested the court to advise them of their rights under the Fifth Amendment. Tr 195. Prosecutor Strider had also threatened Burnes with prosecution outside the courtroom. H 2/24 41. Both witnesses agreed to testify after being instructed.[50] This "possibility" of prosecution was never mentioned at the first trial although both testified. H 3/1 39.

Unbeknownst to the court and defense at trial, there never really was a "possibility." The prosecutors' threats were a sham. At the postconviction hearing, in response to a direct question whether either prosecutor or the state

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was deliberating on guilt not punishment; a juror with concerns about the death penalty would have debated them at the proper time. Courts are to assume that juror's abide by the instructions. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

[50] The threats continued during the testimony of Black, when, after the witness answered "no" to a series of "Isn't it true . . ." questions on cross-examination, Strider asked, "Sir, could I remind you that there's a law in this state and it's called perjury." Tr 217.

had any reason to believe that the witnesses were in any way involved with the murder, prosecutor Williams responded, "No." H 3/1 18.

These threats were "unconscionable"[51] and were calculated to rattle the witnesses into a state of fear and intimidation to the point that the witnesses "were a mere shadow of their original selves." H 2/20 33. Trial counsel testified that at the first trial the witnesses appeared "confident," "honest," "articulate," and "comfortable." *Id*. After the threats, the defendant's "most critical witnesses . . . were visibly shaken. . . . [and] appeared to be scared to death." *Id*. at 33-4.[52] In rebuttal closing argument, the prosecutor attacked Black's credibility and pointed out how "strange" his demeanor was: "I couldn't get him to look at me." Tr unnumbered vol 12/8/84 56.

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[51] *State v. Kyles*, 513 So.2d 265, 277 (La. 1987) (Dennis, J., concurring). On direct appeal, the court found no error in the trial court's instruction. *Id*. at 272. This ruling was made without the benefit of evidence noting the effect of the threats.

[52] Even if the threats do not prevent the witness from testifying, "[t]here is an obvious and considerable difference between the free and open testimony anticipated of a voluntary witness and the perhaps guarded testimony of a reluctant witness . . . " *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973). *See also United States v. Saunders*, 943 F.2d 388 (CA4 1991); *United States v. Morrison*, 535 F.2d 223, 227-28 (CA3 1976).

CONCLUSION

For the above reasons, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

La. Code Crim. Proc. Art. 905.2 Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

La. Rev. Stat. 14:30 First Degree Murder

First degree murder is the killing of a human being:

(1) when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) when the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

For the purposes of Paragraph (2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury.

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D-23(a) Letter Of Joe Warnke H 5/12/89, 2, 16, 17

APPENDIX C

WITNESS	RACE/COMPLEXION	HAIR	AGE	HEIGHT	WEIGHT/ BUILD	CLOTHING
SMALLWOOD	black/dark	braided hair, length to shoulders; had a light mustache	17 or 18			
TERRITO	black/dark	wooly and in platts	28	close to 6 ft	slim	blue jeans and plaid shirt
H. WILLIAMS	black/dark	platted hair; short	19-20	5'4"-5"	140-150/ medium	jeans; pull-over shirt, short-sleeved, possibly w/ black designs
JONES	black/dark	platted	17-18	5'9"	140	blue jeans; short-sleeved dark shirt with little white dots
PLICK	black/"chocolate"		in 20's	5'10"	slender	dark shirt
E. WILLIAMS	black/dark	black				blue jeans, black shirt

Supreme Court, U.S.
FILED
JUL 21 1994
OFFICE OF THE CLERK

No. 93-7927

In The

Supreme Court of the United States

October Term, 1994

CURTIS LEE KYLES,

Petitioner,

versus

JOHN WHITLEY, Warden,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

I. Course of Proceedings

Respondent (hereafter, "the State") accepts petitioner's statement of the course of proceedings.

II. Statement of Facts

On Thursday, September 20, 1984, at approximately 2:20 p.m. Delores Dye ("Mrs. Dye") exited the Schwegmann Bros. grocery store ("Schwegmann's") at 5300 Old Gentilly Road in New Orleans and proceeded to her car which was parked in a Schwegmann's lot across the street. Mrs. Dye had parked towards the end of an aisle of cars. Upon reaching her car, Mrs. Dye loaded her bags of groceries into the trunk of her red 1977 Ford LTD. At this point Mrs. Dye was met by a man who attempted to rob her. When Mrs. Dye would not give up the keys to her car, a struggle ensued. Mrs. Dye momentarily broke away and ran to the passenger side of the car but the perpetrator caught up. She screamed as the perpetrator grabbed her left hand. Not wanting to deal with a difficult victim, the perpetrator produced a .32 caliber revolver and shot Mrs. Dye in the left temple at point blank range. Instantly, Mrs. Dye was dead leaving behind a husband, son and grandson.

The perpetrator then calmly bent over, picked up the car keys from Mrs. Dye's hand, got into her car, and drove out of Schwegmann's parking lot onto Chef Menteur Highway. The perpetrator made a right and then another right turn onto France Road.

A. The Police Investigation

Detective John Dillman ("Det. Dillman") of the New Orleans Police Department's Homicide Unit was the chief investigating officer assigned to Mrs. Dye's murder. He arrived on the scene within minutes and immediately found the following five eyewitnesses who gave statements on the scene and later signed typewritten statements at the police homicide office.

1. Henry Williams, a 50 year old Norco employee, was standing at a barricade in Schwegmann's parking lot.

2. Isaac Smallwood, a 34 year old Norco employee, was working standing at the old gas pumps in Schwegmann's parking lot.

3. Edward Williams, a 16 year old high school student, was waiting for a bus on Chef Menteur Highway in front of Schwegmann's.

4. Willie Jones, a 45 year old Norco employee, was working in the Schwegmann's lot.

5. Lionel Plick, a 62 year old man, was waiting for a bus on Chef Menteur Highway in front of Schwegmann's.

Later that day when Det. Dillman returned to the homicide office he discovered the existence of the following two additional eyewitnesses who had left the crime scene and later called the police to report the murder.

1. Robert Territo, 19 years old, was in his company truck waiting for a red light on Chef Menteur Highway.

2. Darlene Cahill (now "Darlene Cahill Kersh") witnessed the altercation from approximately 100 ft. away while riding in a vehicle on Chef Menteur Highway.

Every witness described the perpetrator as a young black man with his hair in braids or plaits.

The police were substantially without leads until Saturday evening, September 22, 1984, when a man identifying himself as James Joseph[1] ("Beanie") contacted police to report that he was in possession of a red Ford Thunderbird which he believed might belong to Mrs. Dye. Beanie stated that he had purchased the car from his friend, Curtis (later identified to be Curtis Kyles), and discovered that it may be Mrs. Dye's car when he read about the murder in the paper.[2]

Detective John Miller and Sergeant James Eaton met with Beanie that evening at approximately 10:00 p.m. at a pre-arranged location. Det. Miller wore a microphone for his own protection. During this meeting Beanie told Det. Miller and Sgt. Eaton that he purchased Mrs. Dye's automobile from Kyles on Friday, September 21, 1984. Beanie repeated to them that he concluded the car may belong to

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[1] James Joseph had several aliases. He was also known as Joseph Banks, Beanie Banks, and Joseph Brown. His real name is Joseph Wallace. Throughout this brief, Joseph Wallace will be referred to as "Beanie."

[2] The NOPD supplemental police report indicates that Beanie stated in his telephone call that he purchased the car from Kyles on Thursday, September 20, 1984. During his subsequent taped conversation with Detective John Miller on Saturday, September 22, 1984, however, Beanie stated that he purchased the car from Kyles on Friday, September 21, 1984.

Mrs. Dye after reading about the murder in the newspaper. Beanie led Det. Miller and Sgt. Eaton to Mrs. Dye's Ford LTD which police then seized and took to the NOPD Crime Lab Cage for analysis. Beanie then accompanied Det. Miller and Sgt. Eaton to Schwegmann's and to Kyles' residence at 2313 Desire Street. At approximately 12:30 a.m. on Sunday, September 23, 1984, Det. Miller conducted an extensive interview with Beanie at police headquarters, which culminated in a signed statement. During this interview, Beanie repeated substantially what he had earlier told Eaton and Miller.[3]

As a result of the leads supplied by Beanie, Det. Dillman ordered police officers Lambert and Saladino to retrieve garbage from the curb in front of Kyles's residence at 2313 Desire Street. The officers seized five bags of garbage from that location at approximately 1:00 a.m. on Monday, September 24. The garbage bags were immediately locked in the Crime Lab Cage for analysis.

On Sunday, September 23, 1984, Det. Dillman obtained an arrest warrant for Kyles and a search warrant for the residence at 2313 Desire Street. These were executed on Monday morning, September 24th.

Kyles was apprehended without incident. Several incriminatory items of evidence, including the murder

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[3] J.A. 214-215. In his written statement Beanie indicates that his brother-in-law, Ronald Craig, told him that the car was stolen based upon his brother-in-law's viewing of television and newspaper reports. Previously, Beanie told Det. Miller and Sgt. Eaton that he himself learned of the possibility from the newspaper.

weapon, were seized from Kyles's residence at 2313 Desire Street.[4]

Later that day (September 24), Det. Dillman conducted photographic line-ups with six photographs, including Kyles's photograph. Det. Dillman showed the photo line-up separately to Smallwood, Jones, Henry Williams, and Territo. Smallwood, Territo and Henry Williams positively identified Kyles's photograph as that of the murderer. Jones was only able to make a tentative identification of Kyles.[5] Cahill was not shown a photo

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[4] The evidence seized included:

1. Eight Schwegmann's grocery bags from a kitchen cabinet.
2. One .32 caliber revolver containing five live rounds and one spent round located behind the kitchen stove. This was later determined to be the murder weapon.
3. One homemade holster from a cedar chest in the bedroom.
4. One brown case with forty-five live cartridges of various calibers from a dresser drawer in the bedroom.
5. One box of .32 caliber ammunition from a dresser drawer in the bedroom.
6. One .22 caliber rifle from under a mattress in the bedroom.
7. Fourteen .22 caliber cartridges from under a mattress in the bedroom.
8. Schwegmann's bag filled with a large amount of cat and dog food from the kitchen.

[5] Jones did not testify at trial. After trial the defense contacted some of the witnesses and showed them a defense version of a photo line-up in which photos of Kyles and Beanie appeared and in which the hair of Kyles had been superimposed on the head of Beanie. Jones nevertheless picked out the photo

lineup but made an in-court identification on November 26, 1984, during Kyles's first trial, and again at his second trial on December 8, 1984.

B. The Trial

Prosecutors Cliff Strider and Jim Williams represented the State in both the first and second trials. Martin Regan was defense counsel for both trials.

A pathologist opened the trial with testimony about Mrs. Dye's wound and cause of death. The State followed with Territo, Cahill, Smallwood, and Henry Williams, who testified regarding the shooting. Det. Dillman, the chief investigating officer, testified regarding the police investigation, followed by crime scene and laboratory technicians. The State's case ended with Robert Dye, Mrs. Dye's husband, who established that Mrs. Dye often purchased the same brands of cat and dog food that were found in Kyles's residence.

The defense argued at trial that Beanie was the perpetrator instead of Kyles. In support of this assertion defense witnesses, who were friends and relatives of Kyles, testified that Beanie was seen driving Mrs. Dye's automobile on Thursday, September 20; that Beanie changed the license plate on the vehicle, and offered to sell the vehicle on Friday, September 21; and that Beanie was seen looking behind Kyles's kitchen stove on Sunday, September 23.

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of Kyles as the murderer and rejected the photo of Beanie. H. 4-7-89, p. 5.

The State recalled Territo, Cahill, Smallwood and Henry Williams during rebuttal. For each witness, the State brought in Beanie to stand next to Kyles in front of the jury. Without hesitation each witness professed their conviction that Kyles, not Beanie, murdered Mrs. Dye.

The jury returned a verdict of guilty of first degree murder.

C. The Sentencing Phase of the Trial

The State re-introduced its case presented during the guilt phase of trial and presented no other evidence. Kyles's sisters and brothers testified on his behalf. Kyles took the stand as well. The jury recommended the death sentence, which was imposed by the court.

SUMMARY OF THE ARGUMENT

Petitioner Kyles claims he was deprived of fundamental fairness at his trial in both the guilt and sentencing phases because prosecutors and police withheld exculpatory evidence and presented "false" evidence against him.

The State did not withhold exculpatory evidence and did not present false evidence.

The State presented four eyewitnesses at trial who identified Kyles as the perpetrator of a vicious murder committed during an armed robbery at a grocery store. Three of these witnesses saw Kyles shoot the victim, and the fourth saw Kyles leave the area. These witnesses are solid in their identifications of Kyles, and were the heart

of the State's case at trial. Kyles complains that written statements taken from most of these witnesses were inconsistent with testimony given by the witnesses in court, and that he was not provided with the statements before trial. The fact is that these statements contained a few inconsistencies, but the inconsistencies which were present were inconsequential.

Kyles claims he was framed by the real murderer, named "Beanie," who informed on him to police. When police and a prosecutor talked to Beanie they documented their conversations with him. Kyles now claims that some of the information Beanie gave the State was exculpatory. The information Beanie gave police was not always consistent, but that information did inculpate Kyles and did not exculpate him.

Beanie did not testify at Kyles's trial and the State did not present a theory of the case to the jury which was dependent on Beanie's credibility. Police and prosecutors did not consider Beanie to be a suspect in the murder. It did not occur to them to turn over documentation of their relations with Beanie. Kyles likely would have used some of the police information if he had it but the information was not material exculpatory evidence because there is no reasonable probability that, had the information been turned over to the defense, the result of the trial would have been different. The failure to turn over this material does not undermine confidence in the outcome of the trial.

Kyles's *Brady* claims are properly evaluated under *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), since the issue he presents is the

materiality of the allegedly exculpatory or favorable evidence. His claims of police and prosecutor misconduct largely involve issues of withheld evidence and thus can be analyzed in terms of *Bagley*.

Kyles's claim that prosecutors and police withheld material exculpatory evidence fails because he has not demonstrated that the withheld information was material as that term was defined in *Bagley*. Whether considered separately or collectively, the withheld matter does not give rise to "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley, supra*, at 105 S.Ct. 3385 (opinion of Blackmun, J.).

The facts of this case validate Justice Blackmun's conclusion in *Bagley* that "[A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." *Id.*, at 105 S.Ct. 3380 n. 7.

ARGUMENT

I.

THE STATE PRESENTED CONVINCING EVIDENCE OF PETITIONER'S GUILT AT THE TRIAL.

The four eyewitnesses who testified at Kyles's December 8-10, 1984, trial each observed Kyles drive off the Schwegmann's parking lot after Mrs. Dye was shot. Three of the four actually witnessed Kyles shoot Mrs.

Dye. Their attention had been riveted on Kyles as, in the bright afternoon sunlight, Mrs. Dye screamed. They then observed Kyles shoot her, get into her automobile, and drive away. Each positively identified Kyles at trial. In addition, the State presented substantial physical evidence taken from Mrs. Dye's car and from Kyles's residence.

A. FOUR EYEWITNESSES POSITIVELY IDENTIFIED KYLES AS MRS. DYE'S MURDERER.

At a pretrial hearing on Kyles's motion to suppress identification, Det. Dillman testified that eyewitnesses Smallwood, Williams, and Territo instantaneously identified Kyles as the murderer upon looking at the lineup photographs. R. vol. 2, p. 8. Kyles's trial attorney, Martin Regan, cross-examined these witnesses extensively during that hearing, and thus was fully aware before trial of what these witnesses claimed to have seen.[6]

The state called four eyewitnesses during the guilt phase of the trial who identified Kyles in court as the murderer of Delores Dye[7]:

1. *ROBERT JOSEPH TERRITO,* was delivering equipment in his company's truck and was stopped in traffic when he heard Mrs. Dye scream. He was only

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[6] His cross-examination of Mr. Smallwood covered over six pages of transcript (R vol. 2, pps. 14-20); his cross-examination of Mr. Williams covered almost four pages (R vol. 2, pps. 24-27); and his cross-examination of Mr. Territo covered four transcribed pages (R. vol. 2, pps. 32-35).

[7] R. vol 2, trial transcript, Dec. 6, 1984, pps. 11-62.

thirty to forty yards from Mrs. Dye and saw everything that happened after the scream. After the perpetrator drove Mrs. Dye's car off the Schwegmann's lot he pulled up next to Territo, who watched him constantly:

> "I got a good look at him. If I had been in the passenger seat of the little truck, I could have reached out and not even stretched my arm out, I could have grabbed hold of him." R. vol. 2, trial transcript, Dec. 6, 1984, p. 13, 14.

2. *DARLENE CAHILL* was a passenger in an automobile when she witnessed the struggle between Mrs. Dye and the perpetrator. She was within 100 feet of the shooting. She and her companion tried to follow the perpetrator in traffic, saw him from the side about a car length away, and got a good look at him (R. vol. 2, p. 32). Her automobile drove to the side of the perpetrator's car: "We could have hit the driver's door if we wanted to," she testified. *Id.*, p. 34.

3. *ISAAC SMALLWOOD,* a Norco Construction Company employee, was working on a gas pump on the Schwegmann's lot when the murder occurred. He told Det. Dillman that his attention was attracted by the shot, and so testified at Kyles' first trial.[8] He testified at the second trial that he saw the entire incident from a distance of seventy-five to eighty feet. *Id.*, p. 43. Smallwood testified that when Kyles drove off the parking lot he drove within about twenty-five feet of Smallwood (*Id.*, p. 43), and when Kyles drove by on the highway he was about fifteen feet from Smallwood. *Id.*, p. 45. Smallwood

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[8] Trial transcript, Nov. 26, 1984, testimony of Isaac Smallwood, p. 51.

identified Kyles as the perpetrator and said he got a good look at him. *Id.*, p. 43.

4. *HENRY WILLIAMS*, also an employee of Norco Construction Company working on the parking lot, testified that he witnessed the entire event, and that after shooting Mrs. Dye, the perpetrator passed within ten feet of him. *Id.*, p. 55.

After the defense presented its case and revealed its contention that Beanie Wallace was the murderer, the State recalled each of its four eyewitnesses on rebuttal. The State brought Beanie into the courtroom separately for each witness and had him stand next to Kyles, so each witness could compare the two men. Their reactions:

1. Territo chose Kyles over Beanie as the perpetrator (R. vol. 3, trial transcript, Dec. 7, 1984, p. 374), and testified after seeing them together that there was "No doubt in my mind" that Kyles killed Mrs. Dye. R. vol. 3, trial transcript, Dec. 7, 1984, p. 378.

2. Cahill testified after comparing the two that "I'm positive it wasn't the other man" (Beanie) *Id.*, p. 381, and testified she had never seen Beanie before. Speaking of Kyles, she again confirmed her identification, stating:

   "I know it was him. I seen him. I seen his face and I know the color of his skin. I know it. I know it's him." *Id.*, p. 383.[9]

[9] Kyles has filed a motion in state court for a new trial, alleging that Darlene Cahill (now Darlene Kersh) has retracted the testimony she gave at his trial and now claims she could not identify the perpetrator. That motion has not been heard on the merits in any court. The allegation was first made while Kyles's present claim was on appeal in the Fifth Circuit, but was dismissed as untimely filed. See Order of Judge Arceneaux, J.A. 184-7. The Court of Appeals instructed the district court to deny relief on the ground that a petitioner may not use a Rule 60(b) motion to raise constitutional claims that were not included in the original habeas petition. J.A. 43. The Louisiana Supreme Court has stayed action on the motion pending disposition of the present claim in this Court.

3. Smallwood reconfirmed his choice of Kyles. "I'm positive," he testified. *Id.*, p. 387.

4. Henry Williams, when confronted with Beanie, testified that he was "positive" he did not see Beanie in the parking lot. He had "No doubt in my mind." *Id.*, p. 391.

The state trial judge, who presided over both trials and the state post-conviction hearing, pointed out in his judgment on the post-conviction application that Kyles and Beanie "clearly and distinctly did *not resemble*" each other. J.A. 36 (emphasis in the original). Their distinct differences in physical appearance – Kyles was taller, darker, and thinner than Beanie – is evident from examining the photographs of the two men which were introduced into evidence.[10]

[10] The Fifth Circuit majority opinion stated that: "Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face. More importantly, the eyewitnesses and the jury were allowed to compare Beanie and Kyles. After doing so, Smallwood stated, 'they don't look nothing alike to me.' Each eyewitness repeated their conviction that Kyles was the gunman they saw at Schwegmann's." J.A. 55.

1. KYLES' POST-CONVICTION ATTACK ON THE EYEWITNESS TESTIMONY IS WITHOUT MERIT.

Kyles, faced with the direct testimony of Territo, Cahill, Smallwood, and Henry Williams, now claims that he was denied the benefit of the use of the written statements taken from three of these witnesses (Territo, Smallwood, and Williams), as well as written statements taken from three other witnesses who did not testify at trial (Willie Jones, Lionel Plick, and Edward Williams). Kyles claims these statements would have aided him in impeaching the witnesses' testimony.[11]

Under Louisiana law the State has no obligation to turn over written statements of its witnesses which are not exculpatory. The State submits that an examination of these written statements shows that they are not exculpatory evidence as defined by this Court. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

a. Discrepancies in Height, Weight, and Age

In his brief, Kyles provided a chart which lists the physical characteristics of the perpetrator as described in the written statements of the eyewitnesses (brief, appendix "C"). These descriptions present a consistent picture of a perpetrator who was a young Afro-American, of slight build, with braided or platted hair. This description is consistent with Kyles's physical appearance. Kyles cites

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[11] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The statements are found at J.A. 188-213.

slight differences in the witnesses' estimates of the perpetrator's age, height, and weight, as discrepancies and argues that these discrepancies constitute material exculpatory evidence.

Neither the State nor the defense asked any of the eyewitnesses who provided written statements to describe the perpetrator's height, weight, or age, at the trial or in any pretrial hearing.[12] Thus, the estimates of these characteristics as expressed in the written statements given to the police did not contradict testimony given by these witnesses and could not have been used to impeach their testimony.

Det. Dillman testified at pretrial that "[p]ossibly the only discrepancy [in the written statements] would have been in height."[13] Dillman then proceeded to describe discrepancies in height (5'8" to 6' tall), and age ("twenty to twenty-eight, possibly"), with no other discrepancies.[14] As petitioner's diagram in appendix "C" reflects, Dillman's statement was not entirely correct, since the estimated height differences in the six written statements range from five feet, four inches to close to six feet, and the estimated age differences range from seventeen to

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[12] The State did ask Darlene Cahill at Kyles' first trial to give a general description of the perpetrator, to which she replied, "[a]pproximately five-six, five-five . . . ". Trial transcript, Nov. 26, 1984, p. 27. However, Ms. Cahill did not provide a written statement to police, nor was similar testimony elicited in any later proceeding from her. Thus, her testimony is not subject to Kyles's impeachment argument.

[13] Hearing, November 6, 1984, testimony of Det. John Dillman, p. 7.

[14] *Id.*, pps. 7-8.

twenty-eight years. Also, Smallwood's written statement claims the perpetrator had a light mustache and his braids went to his shoulders.[15] However, there is no reason to believe that Dillman's testimony did not represent his good faith recollection at the time, and he was not far off the mark. The discrepancies in the written statements of the eyewitnesses are within an expected range. The age, height, and weight discrepancies in the written statements do not contradict the testimony of the eyewitnesses in court and do not suggest that Beanie may have been the perpetrator. It must be recognized that had Dillman's estimates been more accurate Kyles might have inquired into these discrepancies at trial, slight as they were. These written statements would have been of very limited value, if any, to Kyles. The State submits that existence of the minor discrepancies in these statements is exactly what the Court had in mind when it held in *Bagley* that exculpatory evidence must not only be favorable, but also material, before the state must provide it to the defense.[16] The statements did not constitute material exculpatory evidence.

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[15] J.A. 189. Smallwood's written statement also contains a claim that he did not see the incident before the shot was fired. This is treated in the next part of this argument.

[16] *United States v. Bagley*, 105 S.Ct. 3375, 3380 n. 7 (plurality opinion): " . . . [A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments."

b. Isaac Smallwood's Testimony

Shortly after the murder Isaac Smallwood gave the police a written statement in which he stated that he was standing near the gas pumps on the Schwegmann parking lot when he heard a loud pop. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." J.A. 188-190. He stated that he did not see a weapon, that the car passed near him, and he thought he could identify the person driving the car.

Smallwood's testimony at Kyles's first trial was consistent with his written statement to police shortly after the murder. Smallwood testified during the first trial that he heard the shot and when he looked in the direction from which the shot came the lady was already on the ground.[17]

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[17] At Kyles' first trial, on November 26, 1984, the prosecutor asked Mr. Smallwood what he saw, to which Smallwood responded:

> A. Yes, me and my co-workers, we were standing by until my foreman come back from Schwegmann's from using the telephone, and see I had my back turned to the Chef [highway], and that's when *I heard something went off*; that's when my podnah, Henry [Williams], he said "a woman over there got shot," *so I looked over there towards the lady laying on the ground*, and the guy got up into this woman's car and passed me by in the lot.
>
> - - - - -
>
> Q. *When you looked over there*, what was that individual doing? The lady – *was the lady already on the ground?*
>
> A. *Yes.*
>
> Q. And what was the individual who drove the car, what was he doing?

At the second trial, however, Smallwood testified that he saw the whole incident, including the shooting itself. Nevertheless, Regan, defense counsel at both the first and second trial, was present and heard Smallwood's testimony. Therefore, Regan was, or should have been, aware of Smallwood's testimony regarding the sequence of events. Apparently Regan did not conclude that the discrepancy was worth examining on cross-examination, or perhaps did not even notice the discrepancy because it pertained to a fact which was not questioned at the trial – that the same man who drove Mrs. Dye's car off the parking lot had also shot her.

Kyles now claims that the state should have provided Smallwood's written statement, because that statement partially contradicts his testimony at the second trial. Kyles fails to point out that Smallwood's testimony at the first trial also contradicts his testimony at the second trial, and Regan was present at both to recognize the discrepancy himself. Thus, Smallwood's written statement would not point out any discrepancy which should not have already been apparent on the face of Smallwood's trial testimony. Neither Kyles's defense counsel nor the prosecutors paid attention to the difference in

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A. He just got in the car like it was his own car, and eased over, I guess going on about his own business. Tr. Trans., State v. Curtis Kyles, Criminal District Court, No. 304-163, testimony of Isaac Smallwood at trial on the merits, 11-26-84, p. 50, 51.

At the hearing on Kyles's postconviction application for habeas corpus relief, during the testimony given by his trial attorney, Martin Regan, the judge took judicial notice of the testimony at the first and second trials. Hearing, 2-20-89, testimony of Martin Regan, p. 5.

testimony between the first trial, which was consistent with the statement, and the testimony at the second trial. The difference was inconsequential.

The Fifth Circuit majority, treating this discrepancy, stated:

> Kyles overlooks, however, that Smallwood consistently stated that the gunman then drove the LTD close by him. Smallwood always maintained that he got a good look at the killer then, and like Williams, immediately recognized Kyles in the photographic lineup. Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others.
>
> J.A. 55

B. ALL PHYSICAL EVIDENCE PRODUCED BY THE STATE AT THE TRIAL IMPLICATED KYLES AS MRS. DYE'S MURDERER.

Additional supporting evidence offered by the state during the guilt phase of the trial included: (1) a Schwegmann's sales slip found in Mrs. Dye's automobile which contained two of Kyles's fingerprints; (2) the murder weapon (.32 cal. pistol) found in Kyles' residence behind a kitchen stove; (3) Mrs. Dye's purse, personal papers, and credit cards, found in a trash bag outside Kyles' residence; and (4) Schwegmann's shopping bags seized from Kyles' kitchen, along with cans of the same brands of pet food often purchased by Mrs. Dye.

II.

KYLES HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

Kyles initially claimed that his trial counsel, Martin Regan, was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). He did not pursue this argument in his brief to this Court, although effective performance of trial counsel is one of the issues approved by the Court for review. The Court of Appeals considered only the claim that counsel was ineffective because he did not interview Beanie and call him to the witness stand at trial as a defense witness. This limited claim is treated here because the dissent in the Court of Appeals decision addressed the issue at some length. J.A. 93-97, 108-109.

Martin Regan represented Kyles at trial. Regan is a respected New Orleans attorney who, at the time of Kyles's trial, had tried over one hundred jury trials and participated in at least three capital trials. H 2-20-89, p. 2. Judge Waldron, who presided over the trial and the state postconviction hearing, concluded that "Mr. Regan provided the defendant with a vigorous, dedicated and more than adequate defense."[18]

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[18] Judgment, J.A. 31. Judge Waldron continued, "As he always has been, in the many cases he has tried before this Court, Mr. Regan was a tenacious advocate on behalf of his client. His reputation as an attorney who is always prepared for, familiar with his case, and professional in his presentation remains intact despite the outcome of this particular case." J.A. 31-32.

Regan testified at the postconviction hearing that he did not call Beanie as a witness at the trial because he erroneously thought that under Louisiana law Beanie must be hostile and his testimony must be surprising before Beanie could be cross-examined. The State submits that Regan's decision, even if based upon an erroneous understanding of the law, was proper and Kyles suffered no prejudice from the decision.

If Regan had called Beanie as a witness the likelihood is that Beanie would have refused to testify and invoked a "blanket" Fifth Amendment privilege.[19] Under Louisiana procedure the determination as to Beanie's right to assert his Fifth Amendment privilege would have been made outside the jury's presence and the invocation by Beanie would not, as the dissent suggests, "have presented Kyles with valuable ammunition supporting the theory of the defense." J.A. 108. *State v. Berry*, 324 So.2d 822, 829-830 (La. 1975). Indeed, in Louisiana it is improper conduct for either the prosecution or the defense knowingly to call a witness who will claim a privilege, for the purpose of impressing upon the jury the

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[19] As Judge King pointed out in her dissent, "[t]he entire purpose of calling Wallace [Beanie] would have been to expose his leading role in the development of the prosecution's case, to impeach him and, in the process, to accuse him of framing Kyles and suggest that Wallace had some role in the murder." J.A. 97. However, Judge King was incorrect in concluding that there was a "serious question" as to whether Beanie could have taken a "blanket" Fifth Amendment privilege as to all questions asked. Under Louisiana law Beanie had the right to assert such a blanket privilege, since the evidence introduced by the defense implied that he was the perpetrator. *State v. Savoy*, 537 So.2d 246, 249-250 (La. App. 4 Cir. 1988).

fact of the claim of privilege. *State v. Berry, supra,* at. 830.[20] Once the defense called Beanie the trial court, which was aware of the defense tactic involved, surely would have advised Beanie of his rights and assigned counsel to advise him, as the court did with two other witnesses who appeared on behalf of Kyles.[21]

In the unlikely event that Beanie was called to the stand and did not invoke his Fifth Amendment privilege, he would have surely testified that, as he told police, he purchased Mrs. Dye's car from Kyles, he helped Kyles remove Mrs. Dye's groceries from her car, he took Kyles to Schwegmann's to retrieve his own car, and he knew Kyles carried a .32 cal. pistol. This evidence was not presented by the State, although some of it was brought out on cross-examination of other witnesses by the defense.

To Kyles, Beanie was at best a "loose cannon," as the Court of Appeals majority noted. J.A. 70. Regan could have cross-examined, but his cross-examination would,

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[20] The Louisiana Supreme Court cites as authority for its conclusion the American Bar Association Standards of Criminal Justice, Relating to the Prosecution Function, Standard 5.7(c), and Relating to the Defense Function, Standard 7.6(c) (1971). *Id.*, p. 830.

[21] The trial court appointed an attorney to advise defense witnesses Kevin Black and Johnny Burnes regarding their right to assert their Fifth Amendment privilege, once it became apparent that they may have been accessories after the fact to the murder. R. vol. 2, pps. 194-202. This was done outside the presence of the jury and the procedure was approved in this case by the Louisiana Supreme Court. *State v. Kyles*, 513 So.2d 265, 271-272 (La. 1987), J.A. 12-14.

under Louisiana law at the time, have been limited to impeachment, and, even then, "the impeachment must be limited to evidence of prior contradictory statements." La. R.S. 15:487; see J.A. 32. Contrary to the argument of the dissent below, the limitation of Beanie's cross-examination to impeachment would have prevented or at least drastically limited exploration by Kyles of his claim that Beanie was the murderer. It would also have prevented exploration of other aspects of Beanie's life, such as his prior arrests or possible involvement in crimes other than the murder of Mrs. Dye.

Martin Regan made the correct decision when he decided not to call Beanie as a witness at trial.[22]

III. THE STATE DID NOT FAIL TO DISCLOSE FAVORABLE MATERIAL EVIDENCE, AND DID NOT PRESENT FALSE EVIDENCE AT TRIAL.

The State emphatically denies Kyles's claim that the prosecutors and the police in Kyles's case suppressed information which was favorable and material to Kyles's defense, and used "false" evidence at his trial. The record simply does not support Kyles's charges. An examination of these claims shows that the police and prosecutors acted in good faith in preparing and presenting an overwhelming case against Kyles, and the items possessed by the police about which Kyles now complains did not constitute material exculpatory evidence.

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[22] The Court of Appeals majority treats *Strickland* at J.A. 69-73.

While Kyles has made many claims, they are all without substance. As the federal district court commented while considering Kyles's claims below, "Twenty times zero is still zero." J.A. 180.

A. THE STATE WAS NOT BOUND TO SUPPLY EVIDENCE OF BEANIE'S CHARACTER OR CREDIBILITY.

The Court of Appeals majority noted the fact that the State neither called Beanie as a witness nor informed the jury of the contents of his initial tip to police.[23] As that majority stated, "[p]rosecution witnesses did not mention Beanie by name except in response to the cross-examination by [defense attorney Martin] Regan." J.A. 69. Thus, the State did not recommend Beanie's character or credibility to the jury, and, because neither party called Beanie as a witness, his character and credibility were not issues at the trial. The State did not even claim that Beanie was an innocent purchaser of Mrs. Dye's vehicle,[24] and did not propose a theory of the case to the jury in which Beanie played a part. Beanie "made our case," as prosecutor Strider testified, by providing Kyles's name to police, thus enabling them to conduct photographic lineups with the witnesses which included Kyles's picture.[25]

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[23] Opinion of the Fifth Circuit Court of Appeals, at J.A. 58.

[24] The Fifth Circuit majority noted that the " . . . state never urged and no prosecution witness ever stated that Beanie was an innocent buyer." J.A. 58.

[25] H 2-20-89, testimony of Cliff Strider, p. 116-117. United States District Court Judge Arceneaux stated: "Beanie's testimony and good character were not an issue. Beanie supplied a name. That is virtually all he did." J.A. 169.

However, the State was not obligated to provide evidence of his character, his credibility, or his lack of credibility.

B. THE STATE DID NOT SUPPRESS ANY FAVORABLE MATERIAL EVIDENCE WHICH SHOWED EITHER THAT BEANIE FRAMED KYLES OR MURDERED MRS. DYE.

Kyles claims that the record contains a strong inference that Beanie had a deal with the State for favorable treatment in exchange for information,[26] and implies that the State covered up Beanie's acts in framing Kyles. The record does not support this allegation.

Kyles was convicted of first degree murder less than three months after his arrest. During this brief period the prosecutors, Cliff Strider and Jim Williams, prepared their case for trial by interviewing the homicide detectives assigned to the case, particularly the case officer, Det. Dillman, and homicide Det. John Miller. The prosecutors also interviewed the witnesses to the shooting and had access to some of the police "dailies." They did not receive the police homicide report until after Kyles was tried and convicted.[27]

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[26] Petitioner's brief, p. 35.

[27] The homicide report in this case was forwarded to the District Attorney's office on December 10, 1984, two days after the trial had been completed. Testimony of Cliff Strider, H 2-20-89, p. 102-103, 107-108; testimony of Det. Robert Kessel, H 3-3-89, p. 25.

The police never considered Beanie a suspect in the Dye murder.[28] After the first trial, when Kyles introduced his defense that Beanie had perpetrated the murder, prosecutor Cliff Strider interviewed Beanie for the first time and satisfied himself that Beanie was not the murderer.[29] Beanie was clearly an unsavory character, an informant whom Det. Miller believed to be "a con-man, drug user at times, [and] thief,"[30] a man who was well acquainted with Kyles and his friends,[31] but who was not Mrs. Dye's murderer.

Since the police and prosecutors did not consider Beanie to be the murderer, they did not view their relations with him or his activities to be favorable material evidence which Kyles could use in his own defense. Kyles's complaints regarding evidence the police possessed about Beanie are as follows:

1. The Tape of Beanie's Meeting with Det. Miller on Saturday, September 22, 1984.

The Saturday evening meeting between Det. John Miller and Beanie was their first time to meet in person.[32] Sgt. Eaton placed a microphone on Det. Miller before Miller went to the meeting because he was not sure what

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[28] H 2-24-89, testimony of Det. John Miller, p. 22; testimony of Det. John Dillman, H 2-24-89, p. 71.

[29] H 2-20-89, p. 141.

[30] H 2-24-89, testimony of Det. John Miller, p. 22.

[31] *Id.*, p. 24.

[32] H 2-24-89, p. 2, testimony of Det. Miller.

Beanie had in mind and wanted to protect Miller.[33] The tape was not brought to the district attorney's office until after the trial and was not seen by prosecutors before trial.[34] Det. Dillman did not listen to the tape because police had obtained Beanie's written statement.[35]

Petitioner claims that five parts of the tape contain exculpatory material:

a. The tape shows that Beanie knew where the murder occurred.

Beanie brought Det. Miller and Sgt. Eaton to the location on Schwegmann's parking lot where Beanie claimed Curtis Kyles' automobile was located when he and Kyles retrieved the automobile. Beanie pointed out that was the "same side where the woman was killed at." J.A. 231. He told police that he followed news accounts of the murder, which contained photographic information showing where the shooting occurred.[36] Petitioner argues that Beanie's knowledge of where the murder occurred indicated information which only the perpetrator would know. This conclusion is incorrect.

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[33] Testimony of Det. John Miller, H 2-24-89, p. 26; testimony of Sgt. James Eaton, H 3-3-89, pps. 58-59.

[34] H 3-1-89, pps. 5-6, testimony of assistant district attorney Jim Williams; H 2-20-89, pps. 103-108, 110, testimony of assistant district attorney Cliff Strider.

[35] H 2-24-89, pps. 58-59, testimony of Det. John Dillman.

[36] "I picked up on it when I seen the news and I seen it in the parking lot, and the car was right there." J.A. 229.

Photographs of the murder scene were in New Orleans newspapers and filled New Orleans television, and Beanie carefully followed both. J.A. 247. Prosecutor Cliff Strider concluded in postconviction testimony that everyone who lived in the area knew where the murder occurred.[37] This statement on the tape would have been of no value to Kyles at trial.

b. Beanie made a remark on the tape regarding Kyles's hairstyle.

On the tape Det. Miller asked Beanie about Kyles' hairstyle, which Beanie described as "bushy." J.A. 249. Det. Miller asked Beanie: "Does he ever wear it in plaits?," to which Beanie answered "Uh-huh." *Id.* That is, Beanie signified that Kyles did sometimes wear plaits, the hair style used by the perpetrator at the time of the murder, but Kyles had a bush on "that day," referring to the day after the Dye murder, when Kyles sold him the car. Kyles would have been unlikely to have kept the plaits after a parking lot full of people saw him murder Delores Dye. It is not surprising that the following day he was wearing a bush style hairdo, and the police properly

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[37] H 2-20-89, testimony of Cliff Strider, p. 130: " . . . it was on the T.V., it was on the radio, it was in the newspaper, and I think it was the talk of the town. I mean everybody knew where that occurred. I was in another trial and I knew." Even when the murder first occurred, Strider knew the precise location of the murder: "Near where the old pumps used to be." *Id.* Det. John Miller also emphasized that the case was "played up" on television and in the newspapers. H 2-24-89, p. 15.

attached no significance to the matter.[38] Indeed, if Beanie had been trying to frame Kyles he should have claimed that Kyles wore plaits.

c. Beanie requested on the tape to be reimbursed for the price he had paid for the automobile.

There was never any question that Beanie received money from the police. Det. Dillman acknowledged at the trial, in the presence of the jury, that Beanie was repaid the money ($400.00), he allegedly lost on the car.[39] Det. Miller checked the records during postconviction proceedings and determined that police had paid Beanie a total of $600.00, and this fact was reported to the court.[40]

d. Beanie suggested on the tape that Kyles might put incriminating evidence in his garbage.

Beanie suggested to Sgt. Eaton and Det. Miller that Kyles' garbage "goes out tomorrow" and said "if he's

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[38] Det. John Miller correctly noted in his postconviction testimony: "Well, if I committed a crime and I looked one way, I would do something to alter my appearance, to try and change my identity or the possibility of somebody identifying me." H 2-24-89, p. 50. Miller also testified that there is "nothing difficult at all" about changing a hair style from plaits to a bush. *Id.* It should also be noted that a police photograph taken on June 6, 1984 shows that Beanie was wearing a Jherri curl, not plaits, fifteen weeks before the murder. J.A. 53.

[39] Trial transcript, vol 2, p. 94.

[40] H 2-24-89, p. 20.

smart he'll put it in garbage." J.A. 257. On Sunday night Det. Dillman instructed officers Lambert and Saladino to pick up Kyles' garbage from the curb in front of his residence, which was done.[41]

Kyles now claims that an inter-office memorandum instructing that the garbage be picked up and the taped suggestion by Beanie constitutes favorable evidence for the defense because it shows that Beanie may have planted the victim's purse in Kyles's garbage. The State submits that this conclusion is speculative and the possibility of such was too remote to require that the police consider this to be exculpatory evidence. Anyone could physically have planted the evidence in Kyles's garbage, but there is no evidence that anyone other than residents at Kyles' house did so.

Sgt. Eaton did not consider Beanie's comment to be a suggestion that Beanie might plant evidence, and he did not tell Det. Dillman or prosecutor Strider about Beanie's comment.[42] In context, there was no reason for him to tell them.

e. The tape revealed that Beanie feared apprehension.

Beanie expressed anxiety to Sgt. Eaton and Det. Miller that he had been seen driving Mrs. Dye's automobile. J.A. 246-47. His anger that his acquaintance, Kyles, had exposed him to the danger of being arrested with Mrs.

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[41] R. vol. 2, trial transcript, pps. 63, 112.

[42] Testimony of Sgt. Eaton, H. 3-3-89, p. 65; testimony of Cliff Strider, H. 2-20-89, p. 112.

Dye's automobile may well have been Beanie's chief motivation for calling the police . However, such expressions in no way exculpate Kyles.

2. The Computer Printout Listing Automobiles in Schwegmann's Parking Lot.

At 9:15 p.m. on Thursday, September 20, 1984, about seven hours after Delores Dye was murdered, police surveyed license plates of the vehicles in the immediate area where the murder occurred. These plates were then run through the police computer and a printout made of the results. The printout was discovered in police files during postconviction proceedings, but was never in the district attorney's file.[43] Prosecutor Strider did not see the printout prior to trial.[44] Petitioner now contends the printout was exculpatory, because his vehicle was not listed on the printout.

Petitioner was not a suspect at the time the printout was prepared. Det. John Miller testified in the post-conviction proceedings that not all of the vehicles on the large parking lot at Schwegmann's were included in the survey.[45] The United States District Court and the Fifth

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[43] Testimony of Cliff Strider, H 2-20-89, at p. 136.

[44] *Id.*, p. 135.

[45] Miller was asked whether all of the vehicles were included in the canvass, and Miller replied "not all." Testimony of Det. John Miller, H 2-24-89, p. 11. Det. Miller testified that license numbers were from " . . . a very large parking lot, there were many cars, and. . . . detectives wrote down license numbers on vehicles *in the immediate area of the murder scene." Id.*, p. 12. Indeed, the lot covered five acres, according to the Louisi-

Circuit below concluded that the list was not complete.[46] Since the list included only cars in the immediate area of the murder scene, it could prove nothing if introduced at trial. The list was an investigative tool which produced no helpful information for the police, but was not exculpatory evidence.

3. Information Regarding the Murder of Patricia Leidenheimer.

Kyles claims police should have informed him of an investigation into the unsolved murder of Patricia Leidenheimer, a case in which Beanie admitted being present at Mrs. Leidenheimer's residence during an armed robbery preceding the murder.[47] Homicide Det. Ray Miller (not to be confused with Det. John Miller), the chief investigator in the Leidenheimer case, testified in Kyles's postconviction hearing that no one was charged with the Leidenheimer murder due to a lack of physical evidence.[48]

On November 28, 1984, immediateiy after Kyles first trial, two of Kyles's friends, Johnny Burnes (Kyles's brother-in-law, who later was convicted of murdering Beanie) and Ronald Gorman (a felon who testified for

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ana Court of Appeals decision in the civil case which arose from this murder. *Dye v. Schwegmann Brothers Giant Supermarkets*, 627 So.2d 688, at 690 (La. App. 4th Cir. 1993)

[46] J.A. 64, 149, 166.

[47] Petitioner's brief, pps. 16-17.

[48] H 3-3-89, testimony of Det. Ray Miller, p. 42.

Kyles at his first trial)[49] went to police and claimed that Beanie admitted killing Mrs. Leidenheimer. Det. Miller concluded that Johnny Burnes may himself have been implicated in the murder because of his knowledge of specific, unpublicized details of the murder.[50] Kyles argues that Beanie was not charged because he was supplying information to the police, but provides no proof of this.[51]

The Leidenheimer investigation cannot reasonably be considered *Brady* material. Even if the unproved assertions of Kyles were true and Beanie murdered Mrs. Leidenheimer, that information does not exculpate Kyles for the murder of Mrs. Dye. Beanie has not been convicted of the Leidenheimer murder, so even if his character had been at issue at Kyles's trial this information could not have been used against him. The Leidenheimer murder was an entirely separate affair from the Dye investigation. Det. Dillman, the chief investigating officer in the Dye case, was not even familiar with the Leidenheimer investigation.[52] This claim is simply without merit.

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[49] Judge Arceneaux referred to Gorman as "a convicted felon whose testimony was and continues to be suspect." J.A. 164.

[50] H 3-3-89, testimony of Det. Ray Miller, p. 43.

[51] Leidenheimer was a neighbor of the then Chief of Police, who took a personal interest in the case and repeatedly contacted the homicide detective assigned the case, Det. Ray Miller, for progress reports on the investigation. H 3-3-89, p. 46, 49. It is extremely unlikely that this murder would have remained unsolved simply to help Beanie.

[52] H 2-24-89, testimony of Det. Dillman, p. 64.

4. The Report of a Car Accident on Crozat Street.

Kyles claims that a report received by police during the Dye investigation concerning an automobile accident on Crozat street in New Orleans was exculpatory and should have been turned over to him.[53] The police report, which was placed into the record,[54] relates that a citizen told police he witnessed a "bright red Thunderbird" turn onto Crozat street and strike a parking meter on September 20, 1984, at 7:00 p.m. Kyles's inference is that this may have been Mrs. Dye's automobile operated by Beanie. However, the report indicates that the car involved in the accident had a black and white checkerboard patterned seat, whereas the photographs in evidence of Mrs. Dye's car clearly show that her car was a dull maroon red LTD with a solid maroon vinyl or leather interior. It could not have been the same car. This report, like other materials in police custody, could not have cleared Kyles of the murder charge.

5. Prosecutor Cliff Strider's Interview with Beanie.

After Kyles's first trial, prosecutor Cliff Strider summoned Beanie to his office, where he questioned him for the first time. Strider took notes of the interview. J.A. 258-262. Kyles now claims that inconsistencies between

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[53] Petitioner's brief, pps. 15-16.

[54] Defense exhibit 2.

what Beanie told Strider and what Beanie had previously told police constitute exculpatory evidence.[55]

Strider's testimony at the postconviction hearing shows that he was unaware of inconsistencies between Beanie's statements to him and Beanie's statements to the police on September 20, 1984.[56] These inconsistencies involve events surrounding Kyles's transfer of Mrs. Dye's car to Beanie, the transfer of groceries from Mrs. Dye's car, and Beanie's assistance to Kyles in retrieving Kyles's car from the Schwegmann's parking lot.

If the State had called Beanie to the witness stand and questioned him, these statements would have been discoverable because of their impeachment value to the defense. However, the State did not call Beanie, and impeachment was not an issue.

If Beanie had admitted to Strider that he was involved in the murder, this would have been exculpatory evidence favorable to Kyles. But Beanie made no such admissions, and Strider satisfied himself that Beanie was not the murderer. H 2-20-89, p. 113.

Under the circumstances, Strider's notes were not material exculpatory evidence which should have been turned over to the defense.

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[55] Petitioner's brief, p. 13.

[56] The hearing was held February 20, 1989.

6. Miscellaneous other complaints.

Kyles complains that the State did not provide him with Beanie's rap sheet,[57] without explaining how this would constitute exculpatory evidence.

He complains that prosecutor Strider persuaded the trial court to advise two defense witnesses, Johnny Burnes and Kevin Black, of their rights under the Fifth Amendment. The Louisiana Supreme Court rejected this argument, *State v. Kyles*, 513 So.2d at 271, and the federal district court agreed that the prosecutor had a legitimate basis for considering prosecution of these witnesses under the accessory statute, La. R.S. 14:25 or the obstruction of justice statute, La. R.S. 14:130.1. J.A. 178-179.

IV. THE COURT OF APPEALS CORRECTLY APPLIED THE LAW.

In *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court clarified the legal standard for determining whether the government's failure to disclose evidence warrants reversal of a conviction. The Court rejected any distinction between impeachment evidence and exculpatory evidence for purposes of the *Brady* rule, and then reformulated the standard of materiality applicable to non-disclosed evidence.

The Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 105 S.Ct. 3385 (opinion

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[57] Petitioner's brief, p. 16.

of Blackman, J.); *See* also *Id.* (opinion of White J., concurring in part and concurring in judgment). Justice Blackman's opinion further defined "a reasonable probability as a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)).

The State submits that the Court of Appeals correctly applied the rules set by this Court in *Bagley* to the facts of this case. Petitioner Kyles did not prove his allegations that the police withheld material exculpatory evidence, in violation of *Bagley*, or that prosecutors were guilty of misconduct.

Petitioner's complaints regarding the Court of Appeals' application of *Bagley* to the facts of this case may be considered as follows:

1. "The majority below failed to consider the impact that residual doubt has in this case. This was error." Pet. brief, p. 45.

Kyles argued in the Court of Appeals that *Bagley's* analysis cannot be used in capital cases. J.A. 51. However, that court rejected the argument for a stricter scrutiny standard (J.A. 52), and petitioner has not pursued it in his brief here. He complains only that the Court of Appeals failed to consider the effect of residual doubt, referring to that "uncertainty, though not rising to the level of reasonable doubt regarding guilt, [which] might have led . . . a juror to hold out for a life sentence." *State v. Lee*, 524 So.2d 1176, at 1192 (La. 1987).

The difficulty with considering the effect of withheld evidence on residual doubt, if any, in the penalty phase of a capital trial is that there is no measurable index by which to assess residual doubt. After the reasonable doubt standard has been satisfied the only doubt left, presumably, is some kind of psychological doubt which does not lend itself to rational analysis. By definition, the doubt is unreasonable. In Kyles's case, all of the withheld evidence pertained to the question of guilt, not to the penalty he might receive.

This Court held, in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), that a residual doubt instruction is not constitutionally mandated, while recognizing that residual doubts will inure to the defendant's benefit. *Id.* at 173. The Louisiana Supreme Court has affirmed the denial of a lingering or residual doubt jury instruction in Louisiana, stating "This standard of proof has no statutory or jurisprudential basis." *State v. Percy Davis*, ___ So.2d ___, No. 92-KA-1623, 1994 WL 201131 (La.) (La. 1994)

There was really not much the Court of Appeals could have considered beyond its holding that *Bagley* standards do apply to capital cases.

2. "The majority fails to consider the cumulative effect of the withheld information; the court views each suppressed item as separate and apart from each other. This is wrong as a matter of law." Pet. brief, p. 46-47.

There is no reason to assume that the Court of Appeals majority did not consider the cumulative effect

of the withheld information when it concluded, "We are not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense." J.A. 74.

The Fifth Circuit has recognized cumulative error analysis in a habeas case. *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir. 1991). The circuit has instructed:

> "The sole dilemma for the reviewing court is whether the trial taken as a whole is fundamentally unfair. When a trial is fundamentally unfair, "there is a reasonable probability the verdict might have been different had the trial been properly conducted."
>
> *Id.* (citations omitted)

While the State denies that there were errors to accumulate in Kyles's case, it is evident from the majority opinion that the court considered the evidence as a whole in reaching its decision. This point was made succinctly by Judge Arceneaux below:

> "First, this court has found that none of petitioner's claims has merit; therefore, there is not error to accumulate. 'Zero times twenty is still zero.' *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987)"
>
> J.A. 180

3. **"The majority's assessment that the evidence against Kyles was overwhelming is erroneous, in part because the court fails to make this assessment in light of the defense evidence. It is plainly wrong in 'attach[ing] little significance' to the fact that the jury could not agree on a verdict at the first trial." Pet. brief, p. 47.**

The State submits that the majority did make its assessment in light of the defense evidence. The major part of the opinion written by the majority is spent assessing the defense evidence. The court just did not find the defense evidence persuasive: "Whatever the proof offered in the trial, this transcript contains overwhelming evidence of guilt." J.A. 68, n. 16.

While the Court of Appeals majority attached little significance to the fact that the jury could not agree on a verdict at the first trial, the State suggests that the most apparent difference between the evidence presented in the two trials was that in the second trial the State called Beanie into the courtroom in rebuttal and had the jury and the eyewitnesses view Beanie and Kyles together. The eyewitnesses then testified as to their reactions to seeing Beanie. That may have made the difference.

4. **"In assessing the materiality of the suppressed evidence, the Fifth Circuit majority also fails to take account of other egregious prosecutorial misconduct."** Pet. brief, p. 48.

The "egregious prosecutorial misconduct" to which Kyles refers in this argument is the action of prosecutor Strider in requesting the trial court to advise defense

witnesses Burnes and Black of their rights under the Fifth Amendment.

The State cannot respond to this argument more eloquently or thoroughly than Judge Arceneaux did in his Order and Reasons issued in the United States District Court below:

> This court rejects this argument as did the Louisiana Supreme Court in *Kyles*, 513 So.2d at 271. As stated before, Johnny Burnes' testimony is simply not credible under any circumstances, without any reference to his demeanor. Kevin Black testified that he saw Beanie in the Dye car between 3:15 and 3:30 p.m. on the day of the murder and that Beanie had his hair fixed in braids or plaits at the time. (Trial Testimony at 208-09). In relation to all of the other evidence and testimony adduced, these witnesses' demeanor would not have caused the outcome of this trial to be suspect. In addition the Louisiana Supreme Court found that if Beannie had provided the prosecutor 'information . . . indicating that Burns and Black facilitated defendant's attempts to avoid apprehension and destroy evidence, the prosecutor had a legitimate basis for considering prosecution under the accessory statute, La. R.S. 14:25 or the obstruction of justice statute, La. R.S. 14:130.1.' *Kyles*, 513 So.2d at 272 n. 6.

At the post-conviction hearing, Prosecutor Strider outlined the state's theory of the case as follows:

> Because what happened was that Curtis Kyles shot that lady, he took her car to . . . Kevin Black's apartment, and there is a place where you can park an automobile

that you can't see it – behind Mr. Black's apartment, you can't see it unless you're standing right there. He then got, I believe Mr. Black, to drive him over to his house. They goofed off and there for a little bit. Then they got Johnny Burnes to take Black, Burnes, Kyles and Beanie back to the parking lot where the car was, and Burnes went in and picked up the car, Kyles' car. And Black and Kyles and Beanie waited . . . in the other parking lot while Johnny went over and picked up the car and drove it to Black's apartment complex, where they swapped the groceries from one car to the other car.

(Post-Conviction Hearings, Strider's Testimony, February 20, 1989, at 128-129). There was reason for Strider to ask for the court's intervention. This court cannot find constitutional error in the actions of the trial court."

J.A. 178-179

Kyles's trial counsel was not ineffective.

The record evidence shows that Kyles's trial counsel was not ineffective within the meaning of *Strickland v. Washington*, 104 S.Ct. 2052 (1984). Kyles did not argue counsel ineffectiveness in his brief to this Court, although the issue was authorized for consideration, nor did he cite *Strickland* in the context of counsel ineffectiveness. The State will therefore submit the matter.

CONCLUSION

For the above reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 22 1994
OFFICE OF THE CLERK

No. 93-7927

In The

Supreme Court of the United States

October Term, 1994

CURTIS LEE KYLES,

Petitioner,

versus

JOHN P. WHITLEY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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ARGUMENT

I. THE STATE FAILS TO REFUTE PETITIONER'S DEMONSTRATION THAT HIS CONVICTION WAS BASED ON INCOMPLETE, FALSE, AND DISTORTED EVIDENCE

In the face of Petitioner's well-founded claims of prosecutorial misconduct and failure to disclose relevant favorable and exculpatory evidence, the state's brief seeks to focus exclusively on the guilty verdict at trial. In so doing the state fails to address Kyles's central complaint, that the facts presented at trial were incomplete, distorted, or false, and the state knew it. For example, the state's brief reiterates the eyewitness testimony without responding to Kyles's concerns about the effect of prosecutorial misconduct on the strength and correctness of that testimony, and without even acknowledging, except in a footnote, that one of the eyewitnesses subsequently stated that her testimony was entirely the product of improper state pressure.[1]

It was the prosecution's constitutional obligation to intervene when false testimony was presented to the jury; it failed to do so. Instead the state permitted testimony to go uncorrected that it knew to be false. For example, as was thoroughly discussed in Petitioner's Brief, the state knew that Beanie changed the plate on Dye's car and that Beanie was at Kyles's apartment Sunday, yet it allowed the fact finders to believe those points were in dispute. The state allowed the testimony of Isaac Smallwood to go

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[1] Petitioner's Brief at 3, n.3 & 4.

uncorrected, knowing that he had never previously stated he witnessed the events he described under oath.

A. The State Does Not Even Attempt To Address The False Evidence Claim

There are only two sentences in the state's brief which appear to address the claims that Kyles has grounded in *Napue v. Illinois*, 360 U.S. 264 (1959). The state's assertion that Kyles's claims of "misconduct largely involve issues of withheld evidence and thus can be analyzed in terms of *Bagley*," Respondent's Brief at 9, is flat wrong. As it did at trial, the state ignores the perjured testimony and the evidence creating a false impression.

The state's attempts to minimize Smallwood's false testimony and Det. Dillman's pretrial mischaracterization of the witnesses' statements are unpersuasive. Especially unpersuasive is the state's conclusory denial of any false evidence, followed by the unsubstantiated assertion that "[t]he record simply does not support Kyles's charges." Respondent's Brief 23.

The proof *is* in the record. Isaac Smallwood pointed to Kyles at trial and said "that's the man who I seen kill that woman". Tr 387.[2] He saw no such thing, and the prosecutors knew it.

The state no longer disputes, because it cannot, that it was Beanie who first suggested that the police search

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[2] All citations to the record correspond to Petitioner's Brief 2, n.1.

Kyles's garbage, JA 257.[3] Respondent's Brief 29-30. Yet the state denied that fact at a pretrial hearing. R vol II 47. At another pretrial hearing, the state's witness testified there were no discrepancies among the various witness accounts of the murder, again falsely. R vol I 117-8. This is yet another instance of false testimony fully supported by the record.

The state pretends that the only value of the Strider interview with Beanie is the fact that it contradicted other statements of Beanie. Respondent's Brief 34-35.[4] But it was in this interview that Beanie confirmed he visited Kyles's home the Sunday before the gun was discovered, as Burnes, Kyles, Brown and Campbell all testified. JA 262. Det. Dillman testified that he had "no idea" if Beanie was at Kyles's house on Sunday. Tr 93. The jury was given a false impression about a material matter: whether or not Beanie was in a position to plant the gun found at Kyles's home. *See* Petitioner's Brief 42, n.43.

At the postconviction hearing, Det. Dillman admitted that his testimony at trial – that Beanie was reimbursed $400 for the purchase of the car – was false, and testified

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[3] Prosecutor Strider admitted in the postconviction proceedings that Beanie's suggestion to the police to search Kyles's garbage was *Brady* material. H 2/20 148.

[4] Significantly, the state fails to point out that prosecutor Strider testified in postconviction that Beanie's inconsistencies *would have been* detrimental to the state, *would have been* beneficial to the defense, and, thus, *should have been* disclosed. H 2/20 134.

that Beanie had in fact been paid $600. H 2/24 19-20.[5] The distinction is not trivial: the true amount paid Beanie represents an informant's reward, not the mere recovery of the automobile's $400 purchase price. This is yet another instance of false testimony fully supported by the record.

B. The State Fails To Recognize The Inherent Impeachment Value Of The Witnesses' Statements

The state's reliance on the "four eyewitnesses" who testified at Kyles's trial is misplaced. The state quite simply fails to address the heart of Kyles's argument, that the withheld statements would have severely impeached the eyewitnesses. The state fails to recognize the impeachment value to the defense of the withheld initial statements.[6]

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[5] In its brief, the state claims, "Det. Miller checked the records during postconviction proceedings and determined that police had paid Beanie a total of $600.00, and this fact was reported to the court." Respondent's Brief 29. There is absolutely no evidence that any records were "checked" and certainly there is no evidence of such a payoff in the police files discovered after the trial.

Further, the state claims, "The State did not even claim that Beanie was an innocent purchaser of Mrs. Dye's vehicle. . . . " Respondent 24. This point is belied by Dillman's testimony at trial wherein he states that Beanie was "reimbursed" $400 for the car. Tr 94-95.

[6] One of the eyewitnesses was perhaps not called to the stand by the state because what he observed was very different from the witnesses it did call. According to Edward Williams, "They went around the car about three times . . . she struggled

One of the "four eyewitnesses" is Darlene (Cahill) Kersh; the state notes in a footnote that she recanted her testimony, and misleadingly asserts that "[Kersh] now claims she could not identify the perpetrator." Respondent's Brief 13, n. 9. The state cannot brush aside this recantation so easily. Kersh's affidavit makes clear that she could not identify the perpetrator and she so informed the state, yet the prosecution implored her to lie. RA 22-41. The thrust of Kersh's postconviction affidavit is that there was serious state misconduct.

The state suggests that since the witnesses, other than Smallwood, did not testify to matters different from their original statements, the discrepant descriptions of the perpetrator given at the scene of the crime were not favorable to the defense. The state refuses to address or even acknowledge the obvious: discrepancies *among* the witnesses original descriptions are highly valuable to competent counsel. Trial counsel would have been able to compare for the jury's edification the variant descriptions, and so illustrated that even sincere witnesses may not observe as well as they would like to in moments of sudden shock and violence.

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and began to beat him with the keys like in the face and chest area . . . she was using the keys as a weapon . . . she jugged him 6-12 times." *Dye v. Schwegmann Giant Super Markets*, 599 So.2d 412, 417 (La. Ct. App. 1992).

C. The State Fails To Meet The Remainder Of Petitioner's *Brady* Argument

The state of Louisiana put Curtis Kyles on trial for his life without revealing that it possessed evidence supporting his defense. The state knew, but did not disclose, that the physical evidence against Kyles was obtained only after Beanie told the police where to look[7] and only after Beanie had the time and opportunity to plant the evidence himself.[8] The state knew, but withheld from the defense, the fact that Beanie had what any defense lawyer could have argued was "guilty knowledge" and what any juror might have seen as a motive for framing Kyles. He had the victim's car, he changed the plate on that car, he knew on which side of the Schwegmann lot Mrs. Dye was killed, he knew he had been seen driving the car, and he told the police he was afraid he would get in trouble over the killing.

The defense requested, but the state failed to provide, the witnesses' statements taken at the time of the murder which would have impeached the state's witnesses and shown the capriciousness of the eyewitnesses' identifications. The state knew but failed to reveal that

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[7] "If you set him up good, you can get that same gun," Beanie tells the police officer, who replies "You'd help me?" JA 229. Later the same night Beanie says that "if he's smart" Kyles will put the purse in the garbage. JA 257.

[8] Beanie told Prosecutor Strider that he was at Kyles's apartment twice on Sunday, September 24th. JA 263. Burnes testified he saw Beanie stooping near the stove that night. Tr 263. The garbage, with Mrs. Dye's purse, was retrieved by the police in the early morning on Monday, the 25th, and the gun was found later that same day. Tr 65-75.

Beanie corroborated statements made by key defense witnesses, particularly Johnnie Burnes's claim that Beanie was present at the Sunday dinner and that Beanie changed the license plate. The state knew, but failed to disclose, that a police check of the license plates of cars in the Schwegmann lot did not include Kyles's car. This evidence must be analyzed in light of the state exploiting a blurry enlarged photograph of some of the cars in the parking lot and then arguing to the jury that Kyles's car is visible.[9] The state knew, but did not reveal, that Beanie changed his account of how and when the victim's car was allegedly sold and who was present when the groceries were supposedly unloaded, that Beanie had been arrested at the scene of the murder only a few months earlier, that Beanie had robbed another woman in her home and was at least present when she was shot and killed with his gun. D-9.

The state acknowledges, because it must, that considerable evidence relating to Beanie was withheld from Kyles's trial counsel. The state repeats the lower court's observation that Beanie was not a witness and so his credibility was not at issue, without acknowledging that

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[9] The state responds in its brief that "the United States District Court and the Fifth Circuit below concluded that the list was not complete." Respondent's Brief 31-2. There is no evidence for such a conclusion. In fact, Det. Miller testified post-conviction that he did not know if the list was complete, H 2/24 13. The issue is not whether the list was complete; the issue is, did the list include the car in the photograph that the state showed the jury? The prosecutor argued that the photograph was evidence supporting the state's theory that Kyles drove his own car to Schwegmann and left it there after the murder.

Kyles demonstrated that the withheld evidence concerning Beanie went to the credibility of the *state's case* and the quality of the investigation, not the credibility of a non-witness. Beanie "made the case," the prosecution boasted. Tr unnumbered vol 12/7/84 13. He not only gave the police Kyles's name[10], he told them where he lived, he suggested the search of the garbage that produced the victim's purse, he suggested the search of Kyles's apartment that turned up the murder weapon the day after Beanie went to that apartment, and he agreed to work with the police for a profit. The defense argued at both trials that Beanie framed Kyles and that he did so because he killed Mrs. Dye. In the light of these facts it is entirely irrelevant that Beanie's credibility as a witness was not an issue for the fact finder's determination.

The state seeks to minimize the evidence contained in the documents and on the tape the prosecution secreted by suggesting their value lay only in the internal contradictions. While it is true that Beanie cannot tell the story the same way twice,[11] there is much in the withheld material beyond mere inconsistency. The credibility of the defense witnesses was very much at issue in this trial. Burnes, Campbell, Brown and Kyles himself testified that Beanie was at the Sunday dinner, and had an opportunity to plant the gun which was found there the next day. Tr 263, 291-318. The state's witness, Dillman, testified that he "had no idea" whether or not Beanie was present at

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[10] The district court's finding, relied upon by the state, Respondent's Brief 24, n.25, that Beanie merely supplied the police with a name is contrary to the record. JA 221-257.

[11] *See* Petitioner's Brief at 27, n.26.

the dinner. Tr 93. Beanie himself told prosecutor Strider that he had been at Kyles's apartment twice on the day before Kyles was arrested. JA 262. Thus the withheld evidence would have strongly corroborated critical defense witnesses.

Johnnie Burnes also testified that he saw Beanie change the license plate on Mrs. Dye's stolen car. Tr 260. Again, Det. Dillman professed ignorance of this important fact to the jury. Tr 95. But Beanie admitted to the prosecutor that he had done so. JA 261. His admission fit the defense theory perfectly: Beanie changed the plate because Beanie knew the car was stolen in a murderous robbery, and Beanie had to come up with a scheme to put the blame on someone else. The prosecutor permitted the jury to believe there was a question of fact over who changed the license plate when he knew that Beanie had done it. Again, the evidence withheld by the state would have provided crucial corroboration of an important defense witness.

Kevin Black testified for the defense that Beanie was driving the victim's car on September 20th, the day the murder occurred; he said that Beanie's hair was in plaits. Tr 208. His testimony was perfectly consonant with Ronald Gorman's, who said Beanie tried to sell him the car on that Thursday, and that Beanie's hair was in plaits. Tr 234-35. Black was already "visibly shaken" after the prosecutor told him that he could be facing a charge of "accessory after the fact to first degree murder." H 2/20 33; Tr 198. Absent from the Respondent's Brief is the fact that the prosecutor admitted in the postconviction hearing that there was *no* reason to believe Black and Gorman were involved in the murder. H 3/1 18.

Following Black's direct examination, the prosecutor launched into an attack and accused Black of committing perjury. Tr 216-17. Black denied every allegation regarding any involvement in the murder. Tr 218. Every single element of the story that the prosecutor narrated for the jury's benefit and to the detriment of Black's credibility came from the mouth of Beanie. The only person to allege that Black was in any way involved in the transfer of groceries from the victim's car was Beanie; the only person to hear that story pretrial was Cliff Strider, the prosecutor. JA 258-60.

The vicious attack on Black's credibility, coming after the admittedly unjustified and devastating threat to prosecute him as an accessory to capital murder, worked very much to Kyles's detriment. The state cannot tenably argue that the withheld materials were relevant only to Beanie's credibility when the materials clearly would have corroborated defense witness testimony and when they were the only source of the attack on a critical defense witness.

D. In Louisiana Residual Doubt Is An Appropriate Consideration When Assessing Error At The Penalty Phase

The state claims that the lower court was correct in not considering the effect the suppressed evidence would have had at the sentencing phase on the issue of residual doubt when performing the materiality test for either the

presentation of false evidence[12] or the suppression of favorable evidence.

The state offers sophistry to meet Kyles's argument. The state argues that any residual doubt at the penalty phase is actually an "unreasonable" doubt since the jury found guilt beyond a reasonable doubt. Respondent's Brief 38. In Louisiana, residual doubt is a relevant and appropriate issue for the jury to consider when deciding penalty. *State v. Lee*, 524 So.2d 1176 (La. 1987) (on rehearing). An "uncertainty, though not rising to the level of reasonable doubt," can and does under Louisiana law inure to a defendant's benefit. *Id.* 1192. The state offers no authority to the contrary.[13]

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[12] The lower court failed to analyze the state's presentation of Smallwood's testimony under the harmless error test announced in *Napue v. Illinois, supra*, and upheld in *United States v. Bagley*, 473 U.S. 667 (1985). *See* Petitioner's Brief 46.

[13] The state cites an unpublished appendix in a direct appeal decision in which the appellant unsuccessfully challenged the holding of *Franklin v. Lynaugh*, 487 U.S. 164 (1988). Respondent's Brief 38.

CONCLUSION

For the above reasons, and for the reasons advanced in Petitioner's Brief, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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MOTION FILED
NOV 14 1994

NO. 93-7927

In the
Supreme Court of the United States
OCTOBER TERM, 1994

CURTIS LEE KYLES,
Petitioner,

versus

JOHN P. WHITLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF

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MOTION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

Petitioner, Curtis Lee Kyles, respectfully requests leave pursuant to Supreme Court Rule 25.5 to file the Supplemental Brief set forth below.

SUPPLEMENTAL BRIEF

We file this supplemental brief to call the Court's attention to the importance of its reviewing the record for itself. A single example suffices to make the point; more would burden the Court by rehashing the briefs.

The last two questions asked by the Court during oral argument in this case and Respondent's answers are as follows:

QUESTION:	But of course, the prosecutor argued that he [Beanie] wasn't even there [at Kyle's home] on Sunday when they knew he was, if I remember ...
MR. PEEBLES:	Well, I don't think the prosecutor knew that as a fact.
QUESTION:	The police knew he was. This is another thing the police didn't tell the prosecutor.
MR. PEEBLES:	The police said that they — the police contact with this man was Detective Miller, and Detective

> Miller didn't even inform his — the principal homicide detective in this case of most of the things that he did with this informant.

When the prosecutor argued at trial that Beanie was not at the Kyles home on Sunday, the prosecutor knew as a fact that Beanie was at the Kyles home on Sunday. Assistant District Attorney Cliff Strider's handwritten notes of his pretrial interview with Beanie Wallace show that Beanie told Strider about two trips Beanie made to the Kyles home on Sunday. JA 262. Strider knew that Beanie went to Kyle's on Sunday at the request of Beanie's Police Department contact, "Miss Williams" (*see* JA 261), who "asked" Beanie to "find out about the gun." JA 262. Strider knew that, 30 minutes after the second visit, Beanie met Detective John Miller, who again "asked about [the] gun." JA 262. Strider knew that Beanie was in the Kyle's kitchen (where the gun was later found), possibly alone. *See* JA 262 (Beanie's statement that he went to the kitchen to eat, "B[eanie] first, then rest of guys").

In the postconviction hearing, Assistant District Attorney Strider testified that he asked Chief Detective John Dillman (the principal homicide detective) about the contents of Beanie's conversations with Detective Miller, that Dillman knew the substance of those conversations, and that Dillman carefully described the conversations to Strider.[1]

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[1] *See, e.g.*, H 2/20 104 (testimony of Strider: "I do remember asking Det. Dillman 'what did Beanie have to say, what was the conversation Beanie had with Johnny Miller, what was the content of that?' And he told me what the content was . . . "); H 2/20 109 (Strider: "Det. Dillman is a very diligent officer . . . . He would tell me everything in his file. . . . I'm sure

WHEREFORE, Petitioner respectfully requests that this Court grant leave to file this Supplemental Brief.

Respectfully submitted,

By: _____

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footnote 1 continued

he did listen to the tape [of Beanie's conversation with Detective Miller],"); H 2/20 103 ("I spoke to Detective John Dillman, and he told me the details. That's how I prepared myself was through Detective Dillman.") *See also* H 2/20 108, 113, 121, 137 (testimony of Strider); H 3/1 7-8, 13, 16, 17 (testimony of Assistant District Attorney Williams).